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2536
No. 11959

United States
Circuit Court of Appeals
for the Ninth Circuit

INDEPENDENCE LEAD MINES COMPANY,
a Corporation,

Appellant,

vs.

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the
District of Idaho, Northern Division.

FILED

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PAUL P. O'BRIEN, JR.

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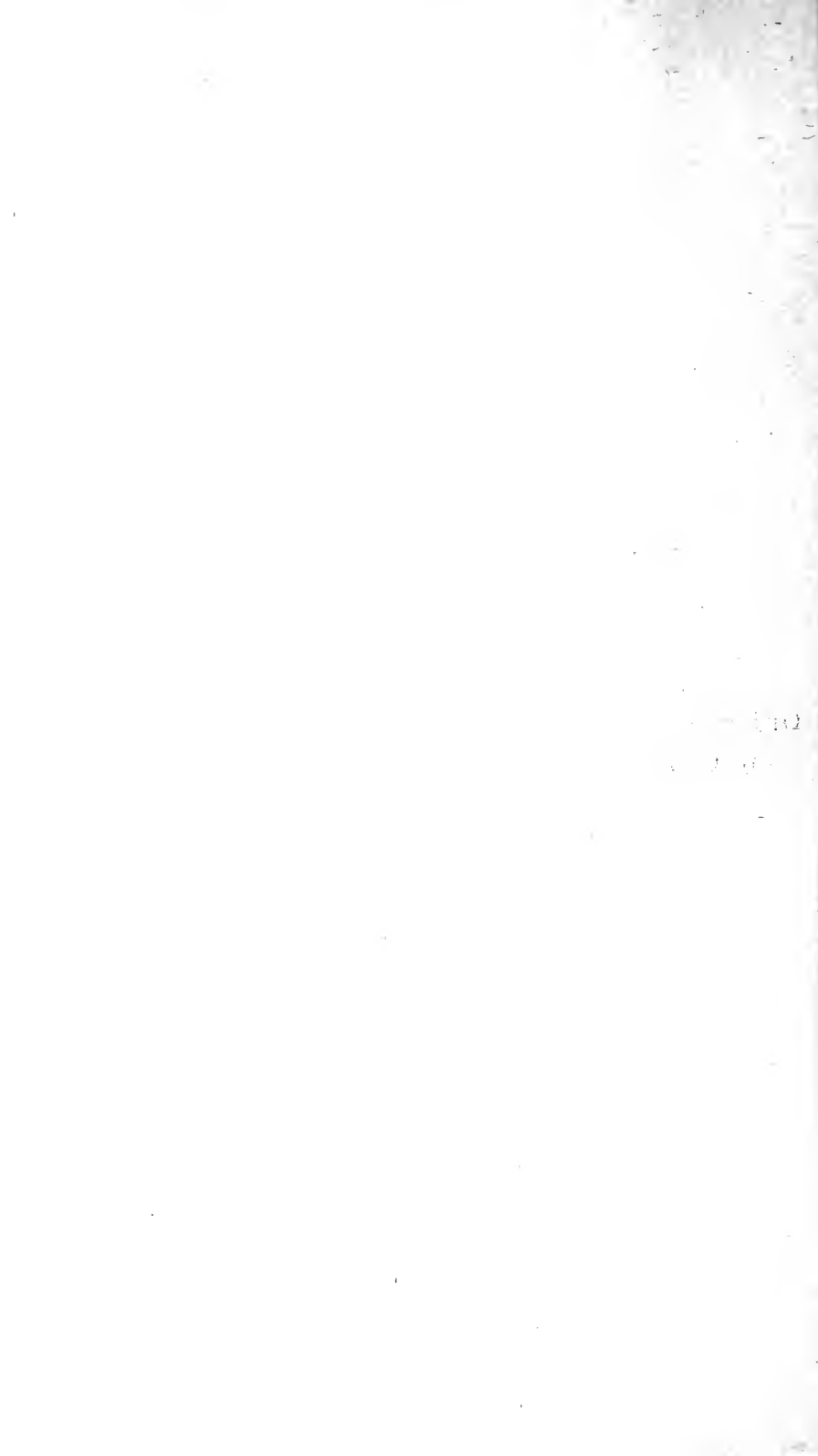
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

R. MAX ETTER

WILLIAM E. CULLEN

726 Paulsen Building, Spokane, Washington

WALTER H. HANSON

Wallace, Idaho

Attorneys for Appellant.

H. J. HULL

Wallace, Idaho

J. K. CHEADLE

1301 Old National Bank Building,
Spokane, Washington

Attorneys for Appellees. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the District of Idaho, Northern Division

No. 1603

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,
a corporation,

Defendant.

COMPLAINT

Plaintiffs complain of the defendant, and for cause of action allege:

I.

The jurisdiction of this Court is founded upon diversity of citizenship and the amount involved.

(a) The plaintiffs are citizens and residents of the State of Idaho.

(b) The defendant is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Arizona. The defendant is qualified and authorized to transact business in the State of Idaho and maintains its principal office in the City of Wallace, Shoshone County, Idaho.

(c) The matters in controversy exceed \$3,000.00, exclusive of interest and costs.

Jurisdiction is also founded upon the fact that

the defendant corporation owns no property and transacts no business in the State of Arizona. It maintains no office in that State except such as is required to maintain its corporate existence there. All of the defendant's property is situated in the County of Shoshone, State of Idaho, and all of its business is transacted there. All books and records of the corporation, including all corporate records material to this controversy, are kept and maintained at Wallace, Shoshone County, Idaho, and all of the defendant's directors and officers reside in the City of Wallace, Idaho. [3]

II.

The defendant was incorporated in the State of Arizona in the year 1929. Its original Articles of Incorporation were filed in the office of the Arizona Corporation Commission and its charter was issued on the 16th day of September, 1929. A copy of said original Articles of Incorporation, duly certified to by the Secretary of the Arizona Corporation Commission, was filed in the office of the Secretary of State of the State of Idaho on the 12th day of November, 1929, and a copy thereof, duly certified to by the Secretary of State of the State of Idaho, was filed for record in the office of the County Recorder of Shoshone County, Idaho, as Instrument No. 84804 on the 15th day of November, 1929. At all times since the defendant has maintained its right to transact business in the State of Idaho. A full, true and complete copy of

said original Articles of Incorporation is hereunto annexed, marked for identification Exhibit "A", and by this reference is made a part of this Complaint.

III.

Originally the authorized capital stock of defendant was \$4,000,000.00, divided into 4,000,000 shares of the par value of \$1.00 per share. Said original authorized capital was divided into 3,000,000 shares designated as "Common Stock" and 1,000,000 shares designated as "Preferred Stock", the latter being non-assessable and having certain preferences with respect to the division of profits and proceeds of liquidation, more fully set forth in said Exhibit "A".

IV.

Prior to February 10, 1932, no part of said 1,000,000 shares of Preferred Stock had been issued. On that date the stockholders of the defendant, by resolution duly adopted at a meeting of the stockholders called for that purpose, amended the Articles of Incorporation by abolishing and eliminating said authorized Preferred Stock and creating and authorizing in lieu thereof 1,000,000 shares to be known as "Common Stock, Class A", and providing that said Common Stock, Class A, should be non-assessable. Said amendment to the Articles of Incorporation of the defendant corporation was duly filed in the office of the Arizona Corporation Commission on the 23rd day of [4]

February, 1932. A copy thereof, duly certified to by the Secretary of the Arizona Corporation Commission, was filed in the office of the Secretary of State of the State of Idaho on the 15th day of March, 1932, and a copy thereof, duly certified to by the Secretary of State of the State of Idaho, was filed in the office of the County Recorder of Shoshone County, Idaho, as Instrument No. 90997 on the 24th day of March, 1932. A full, true and complete copy of the said Amendment to the Articles of Incorporation, marked for identification Exhibit "B", is hereunto annexed and by this reference is made a part of this Complaint.

V.

Upon the amendment of said Articles of Incorporation, the defendant, for value received, issued said 1,000,000 shares of Common Stock, Class A, evidenced by its Certificate No. 350, to the Mines Finance Corporation, an Idaho Corporation. Thereafter, and on the 31st day of December, 1941, said Mines Finance Corporation assigned and transferred 666,667 shares of said Common Stock, Class A, to the plaintiff, Alma R. Kingsbury, and assigned and transferred 333,333 shares thereof to one Herman Marquardt, deceased husband of the plaintiff, Olga Marquardt. Thereupon the defendant reissued said 666,667 shares to the plaintiff, Alma R. Kingsbury, evidenced by its Certificate No. 7351. and 333,333 shares to the said Herman Marquardt, evidenced by its Certificate No. 7350. A full, true and correct copy of the form of cer-

tificates issued by defendant corporation as evidence of said Common Stock Class A is hereto attached, for identification marked "Exhibit C" and by this reference is made a part of this Complaint.

VI.

August 29, 1942, the said Herman Marquardt died testate and his Will and Estate were duly probated in the County of Shoshone, State of Idaho, and on the 15th day of September, 1943, a Decree of Distribution was entered therein, wherein and whereby the said 333,333 shares of Common Stock, Class A, of the defendant were distributed to the plaintiff, Olga Marquardt. November 9, 1944, the plaintiff, Olga Marquardt, presented said Certificate No. 7350 to the defendant [5] for transfer to herself and the defendant thereupon issued and delivered its Certificate No. 8341 to the plaintiff, Olga Marquardt, evidencing said 333,333 shares of Common Stock, Class A.

VII.

The plaintiff, Alma R. Kingsbury, is now the bona fide owner and holder of said 666,667 shares of Common Stock, Class A, evidenced by Certificate No. 7351, and the plaintiff, Olga Marquardt, is now the bona fide owner and holder of said 333,333 shares of Common Stock, Class A, evidenced by Certificate No. 8341.

VIII.

Plaintiffs are informed and believe, and upon

such information and belief allege that the entire 3,000,000 shares of authorized Common Stock and 1,000,000 shares of authorized Common Stock, Class A, of the defendant heretofore has been issued and is now outstanding.

IX.

Heretofore defendant acquired and became the owner of 1,001,000 shares of the capital stock of the Clayton Silver Mines, Inc., an Arizona corporation, qualified to transact business in the State of Idaho, and the owner and operator of the Clayton Mine, situated in Custer County, Idaho. For convenience said Clayton Silver Mines, Inc. will hereinafter be referred to as the "Clayton".

X.

About September 1st, 1944, the defendant authorized the distribution of all or a substantial portion of said Clayton shares to the shareholders of the defendant corporation on the basis of one share of Clayton to each four shares of the defendant company's stock owned by each of the shareholders. As hereinbefore alleged, defendant corporation has 4,000,000 shares issued and outstanding, including the 1,000,000 shares of Common Stock Class A owned by these plaintiffs. Thus the ratio of Clayton shares owned by defendant to its own issued and outstanding stock is one to four.

The defendant is now engaged in making the distribution of said Clayton stock, but in making said distribution defendant is wrongfully and un-

lawfully refusing to distribute any of said Clayton stock to these plaintiffs by virtue of the 1,000,000 shares of [6] Common Stock Class A owned by them as hereinbefore alleged.

XI.

Plaintiffs have made repeated demands upon defendant for the delivery to them of the shares of Clayton stock to which they are entitled by virtue of their ownership of said 1,000,000 shares of Common Stock Class A, but the defendant has refused, and still refuses, to distribute or issue any part of said Clayton stock to these plaintiffs by virtue of said Common Stock Class A. The defendant wrongfully contends and asserts that said Common Stock Class A, owned by these plaintiffs, is not entitled to participate in the distribution of said Clayton stock, or in any capital distribution which the defendant company may make.

XII.

Plaintiffs allege that said Common Stock Class A has, and is entitled to enjoy, all of the rights, privileges and benefits of the Common Stock of the defendant company, and are entitled to participate in the distribution of said Clayton stock on the same and identical basis as the Common Stock of the defendant company, to-wit, on the basis of one share of Clayton for each four shares of said common stock Class A. owned by plaintiffs, or a total of 250,000 shares of said Clayton stock.

XIII.

The reasonable value of said 250,000 shares of Clayton stock at the time defendant refused to deliver same to the plaintiffs as herein alleged was the sum of \$150,000.00. That since the distribution of said Clayton stock was authorized by the defendant, and subsequent to plaintiffs' demand therefor, as hereinbefore alleged, the Clayton has declared and paid a dividend of $1\frac{1}{2}$ cents per share and the dividend attributable to said 250,000 shares, amounting to \$3,000.00, was paid to and received by the defendant corporation. That by reason of defendant's refusal to deliver said Clayton stock to these plaintiffs they have been damaged in the sum of \$153,000.00.

Wherefore, Plaintiffs pray for the judgment of this Court:

1. That the defendant, Independence Lead Mines Company, be ordered and directed to forthwith distribute and deliver to these plaintiffs, 250,000 shares of the capital stock of said Clayton [7] Silver Mines, Inc., and pay to the plaintiffs the sum of \$3,000.00, being the dividend declared and paid thereon as herein alleged.

2. Or that in the alternative plaintiffs have and take judgment against the defendant, Independence Lead Mines Company, for the sum of \$153,000.00, with interest thereon as provided by law.

3. For such other and further relief as to the Court shall seem equitable.

4. For the Costs and disbursements of this action.

H. J. HULL

Attorney for Plaintiffs.

State of Idaho,
County of Shoshone—ss.

Alma H. Kingsbury and Olga Marquardt, being first duly sworn, say:

That they are the plaintiffs in the above entitled action; that they have read the foregoing complaint and know the contents thereof and believe the facts therein stated to be true.

ALMA R. KINGSBURY
OLGA MARQUARDT

Subscribed and sworn to before me this 8th day of June, 1945.

[Seal] H. J. HULL

Notary Public in and for the State of Idaho, residing at Wallace, Idaho. [8]

“EXHIBIT A”

INDEPENDENCE LEAD MINES COMPANY
ARTICLES OF INCORPORATION

Be It Known, That we, the undersigned, both of Phoenix, Arizona, do hereby associate ourselves

(“Exhibit A”—Continued)

together and form a corporation under the laws of Arizona and adopt the following Articles of Incorporation:

Article I. The name of the corporation is

INDEPENDENCE LEAD MINES COMPANY

and its principal place of transacting business is Phoenix. Offices may be established, business transacted and meetings of stockholders and directors held at such places within or outside of Arizona as the By-Laws of the Company shall provide.

Article II. The general nature of the business proposed to be transacted is to make contracts; to purchase, lease, option, locate or otherwise acquire, own, exchange, sell, or otherwise dispose, pledge, mortgage, hypothecate and deal in mines, mining claims, mill sites, mineral lands, coal lands, oil lands, timber lands, water and water rights and other property, both real and personal, and to work, explore, operate and develop the same, and to deal in the products and by-products thereof; to purchase, lease, or otherwise acquire, erect, own, operate and sell smelting and other ore reduction works, oil refineries, saw-mills, power plants, railroads and tramways to lead from the company's principal works, and steam, electric and motor railroads to serve as common carriers and otherwise outside the State of Arizona; to do a general manufacturing and mercantile business; to own, handle and control letters, patent and inventions; to own,

("Exhibit A"—Continued)

cancel and re-issue shares of its own capital stock and to own and vote shares of other corporations; to issue bonds, notes and other evidences of indebtedness and to secure the payment of the same by mortgage, deed of trust or otherwise; to act as agent, trustee, broker, or in any other fiduciary capacity and to borrow and loan money; and in general to do and perform such acts and things and transact such business, not inconsistent with law, in any part of the world, as the Board of Directors may deem to the advantage of the corporation. To engage in any other manufacturing, mining, construction, production, refining or merchandising business of any kind or character whatsoever, and to that end to acquire and own, hold and dispose of any and all property of any nature. To buy and sell ores, bullion, metals and concentrates and tailings and other materials and to reduce ores and minerals for pay. To purchase, use and own and enjoy any and all franchises useful or beneficial for the prosecution of the business of this corporation. To apply for, register, purchase and lease or otherwise acquire, hold, own, use, operate, introduce, develop or control, sell, assign or otherwise dispose of, take or grant licenses or other rights with respect to, and in any and all ways to exploit or turn to account inventions, improvements, copyrights, patents, trade marks, formulae, trade names and distinctive makes and similar rights of any and all kinds and

("Exhibit A"—Continued)

whether granted, registered or established by or under the laws of the United States or of state thereof, or of any other country or place. To purchase or otherwise acquire, obtain and interest in, hold, pledge, mortgage, sell exchange or otherwise dispose of stocks, voting trust certificates, bonds, mortgages, debentures, notes, commercial paper and other securities, choses in action, evidences of indebtedness, certificates of interest or other [9] obligations of any nature however evidenced; to exercise any and all rights, powers and privileges of individual ownership or interest in respect to any such securities or obligations, including the right to vote thereon; to acquire or to become interested in any such securities or obligations by original subscription or otherwise and irrespective of whether or not such securities or obligations are fully paid or subject to further payments. To promote, finance, aid and assist financially or otherwise any corporation or association formed under the laws of the United States or of any state, territory, colony or possession thereof, or of the District of Columbia, or of any foreign country or any firm or individual in the business, financing or welfare of which or of whom the corporation has any interest of any nature, or with which or with whom it has business dealings; and in connection therewith to guarantee or become surety for the performance of or assume any undertaking or obligation or the payment of principal of or interest on obligations and dividends on

("Exhibit A"—Continued)

stock or other payments whatsoever and by endorsement or otherwise to guarantee the payments of principal of and interest on bonds, debentures, notes, drafts and other securities, evidences of indebtedness and obligations; and to aid in any manner any corporation or association or any firm or individual, of which the corporation is a creditor, or of which stock, voting trust certificates, bonds, mortgages, debentures, notes, drafts, or other securities, evidences of indebtedness, certificates of interest, or obligations are held or owned by the corporation and generally to do any acts or things designed to protect, preserve, improve, or enhance the value of any such stock, voting trust certificates, bonds, mortgages, debentures, notes, drafts, or other securities, evidences of indebtedness, certificates of interest or obligations.

In furtherance and not in limitation of the general powers conferred by the laws of the State of Arizona, and of the objects and purpose hereinbefore stated, it is expressly provided that the corporation shall also have the following powers, that is to say:

(a) To do any and all things herein not forth to the same extent and as fully as natural persons might or could do, and in any part of the world, and as principal, agent, contractor or otherwise and either alone or in conjunction with any other individuals, firms, associations, corporations or syndicates; and to make and perform contracts of every kind and description.

(“Exhibit A”—Continued)

(b) To borrow or raise money and upon any terms and for any purpose; to issue, sell or dispose of the corporation's bonds, debentures, notes, certificates of indebtedness and or other obligations, secured and unsecured and however evidenced, convertible into stock or not so convertible, upon any terms and in any lawful manner; to mortgage, convey or assign in trust, pledge, grant any charge or impose any lien upon all or any part of the real or personal property, rights, interests, or franchises of the corporation, whether owned by it at the time or thereafter acquired.

(c) To make, execute, endorse and accept promissory notes, bills of exchange and other negotiable instruments for any of the purposes of the corporation; and to redeem any debt or other obligation before the same shall fall due on any terms and at any advance or premium.

(d) To pay for any property, rights or interest acquired by the corporation in money or other property, rights or interests or by assigning, issuing or delivering in exchange therefore its own stock, bonds, debentures, notes, certificates of indebtedness and/or other obligations, secured or unsecured and however, evidenced, convertible into stock or not so [10] convertible upon any terms and in any lawful manner; to purchase or otherwise acquire, hold, sell, convey or assign, pledge, transfer, or otherwise dispose of and to re-issue any shares of its own capital stock (so far as may be permitted by law) and its bonds, debentures,

("Exhibit A"—Continued)

notes, certificates of indebtedness and/or other obligations, secured or unsecured and however evidenced, convertible into stock or not so convertible, upon any terms and in any lawful manner.

(e) To do all and everything necessary or proper for the accomplishment of the objects herein enumerated or necessary or incidental to the protection or benefit of the corporation and in general to carry on any lawful business necessary or incidental to the attainment of the objects or purposes of the corporation or which may conveniently be carried on in connection with any of the business of the corporation.

(f) To conduct its business and in connection therewith to maintain one or more offices in the State of Arizona, other states, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries.

Nothing herein shall be deemed to limit or exclude any power, right or privilege given to the corporation by law or construed to give to the corporation any rights, powers or privileges not permitted by the laws of the State of Arizona to corporation organized under the statutes of the State of Arizona for the purposes for which the corporation is organized.

The foregoing clauses shall be construed as objects, purposes and powers, and it is expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict

(“Exhibit A”—Continued)

in any manner the objects, purposes and powers of the corporation.

Article III. If so determined by the Board of Directors, the corporation may from time to time receive money and/or other property upon the condition that it credit the amount or value thereof to reserve or surplus and such money or other property may be an undivided part of a consideration for another part of which stock, bonds, debentures and/or other obligations of the corporation are issued. Against any reserve or surplus so established there may be charged losses at any time incurred by the corporation, also dividends or other distributions upon stock. Such reserve or surplus may be reduced from time to time by the Board of Directors for the purposes above specified, or by transfer from such reserve or surplus to capital account.

Article IV. No holder of any stock of the corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of the corporation or for any additional stock or any class to be issued pursuant to any increase of the authorized capital stock of the corporation, regardless of how said stock may have been placed in the treasury of the corporation, or of bonds, certificates of indebtedness, debentures or other securities convertible into stock of the corporation but any such unissued stock or any such additional authorized issue of new stock, or of securities convertible into stock may be issued and disposed of

("Exhibit A"—Continued)

by the Board of Directors to such persons, corporations, or associations and upon such terms as the Board of Directors may in its discretion determine, without offering to the stockholders then of record, or any class of stockholders thereof, on the same terms or on any terms; and any shares or convertible securities which the Board of Directors may determine to offer for subscription to holders of stock may as said Board of Directors shall determine [11] be offered to holders of any class or classes of stock at the time existing to the exclusion of holders of any or all other classes at the time existing.

Article V. In case the corporation enters into contracts or transacts business with one or more of its directors, or with any firm of which one or more of its directors are members, or with any corporation or association of which one or more of its directors are stockholders, directors or officers, such contract or transaction shall not be invalidated or in anywise affected by the fact that such director or directors have or may have interests therein which are or might be adverse to the interests of the corporation even though the vote of the director or directors having such adverse interest shall have been necessary to obligate the corporation upon such contract or transaction and even though the fact of such interest was not disclosed to other directors or stockholders acting upon or in reference to such contract or transaction. No director or di-

(“Exhibit A”—Continued)

rectors having such adverse interest shall be liable to the corporation or to any stockholder or creditor thereof or to any other person for any loss incurred or by reason of any such contract or transaction nor shall any such director or directors be accountable for any gains or profits realized thereon.

Article VI. The corporation may sell, lease or exchange all of its property and franchises upon the consent of and for such consideration and upon such terms as may be approved by, the holders of a majority of the total number of shares of all stock issued and outstanding, expressed in writing with or without a meeting or by vote at a meeting called for that purpose in the manner provided by the By-Laws of the corporation for special meetings of stockholders.

Article VII. The Board of Directors shall have the general management and control of the business and property of the corporation and may exercise all the powers of the corporation except such as may be expressly limited by statute, charter or By-Laws to the stockholders. Without limiting the generality of the foregoing powers and subject to and unless prohibited by the statutes of the State of Arizona, the Board of Directors, without consent or other action of the stockholders of the corporation may authorize the corporation to purchase, lease or otherwise acquire, hold, mortgage,

("Exhibit A"—Continued)

convey or assign in trust, pledge, sell, convey, lease or otherwise dispose of such property, real and personal, without as well as within the State of Arizona, as the Board of Directors may from time to time determine, and in payment for any property or for money or any other consideration and so far as may be lawful, to issue or cause to be issued stock of the corporation or bonds, debentures, notes or other obligations thereof, secured or unsecured and convertible into stock or not so convertible.

Article VIII. The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times as the Board of Directors may designate, in cash, real or personal property, services, leases, options to purchase, or any other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefor, shall thereupon and thereby become and be fully paid as the paid for in cash at par, and the judgment of the directors as to the value of any property, right or thing acquired in exchange for capital stock shall be conclusive. Of said stock 3,000,000 shares shall be known as and called "Common Stock" and shall have the usual [12] rights pertaining thereto. 1,000,000 shares shall be known as and called "Preferred Stock"

("Exhibit A"—Continued)

and the holders of said preferred stock shall be entitled to receive from the surplus or net profits of the corporation a yearly dividend of seven percent, payable quarterly, semi-annually, or annually, as the directors from time to time may decide or as may be at any time provided in and by the By-Laws of the corporation, before any dividends shall be paid on the common stock, but such dividends on the preferred stock shall not be cumulative and the holders of said preferred stock shall not be entitled to participate in any other additional profits except as hereinafter provided. On dissolution or liquidation of the corporation the holders of preferred stock shall be entitled to receive the full par value of said stock and the dividends due thereon before any payment is made on the common stock and any property remaining shall be distributed regularly among the holders of all of the stock in the manner following: If, after the holders of the preferred stock have been paid and have received the full par value of said stock and all dividends due thereon, then the holders of the common stock shall, if sufficient funds remain for that purpose, be paid the par value of their stock. If, after the payment of the par value of both preferred and common stock, any additional funds and/or other resources remain, it shall be distributed ratably among the holders of both preferred and common stock, according to the number of shares held by each.

("Exhibit A"—Continued)

At any time during any year of the corporate existence of this company, if and when and after the dividend then due on the preferred stock shall be paid and sufficient funds remain in the treasury of the corporation, then a dividend may be declared on the common stock, but if during any such year a dividend of seven percent shall be paid on the common stock after a dividend of seven percent has been paid on the preferred stock, then any further or additional dividends for any such year shall be paid equally upon the common and preferred stock, it being the intention of this Article to provide that during any year, after a dividend of seven percent has been paid upon the preferred stock and also a dividend of seven percent upon the common stock, then any dividends thereafter declared and/or paid during said year shall be declared and paid in the same amount upon both common and preferred stock.

The preferred stock shall enjoy voting privileges equal to that of the common stock and it is not and shall not be callable or called without the consent of the record holder and/or holders thereof, and no certificate of stock shall be called unless the registered voter thereof consents thereto.

Article IX. The time of the commencement of the corporation shall be the day these Articles are filed in accordance with law and the termination thereof shall be twenty-five years thereafter, with

(“Exhibit A”—Continued)

privilege of renewal and right of perpetual succession as now provided by Law.

Article X. Sec. 1. The affairs of this corporation shall be conducted by and its government vested in a board of not less than three but not more than fifteen directors.

Sec. 2. Within said limits, the number of directors shall be fixed from time to time by the By-Laws. The directors shall be classified with respect to the time for which they shall severally hold office, by dividing them into three classes, each consisting of one-third of the whole number, or, in case the directors shall consist of an odd number, then as near to one-third of the whole number as may be, fixing one class at less than one-third if required. At the [13] annual meeting of stockholders at which this Article is adopted, three directors shall be elected for the ensuing terms and until their successors are duly elected and qualified. The board shall, when elected, determine by majority vote how the three classes shall be constituted for the next one, two and three year terms respectively. Thereafter, at each annual election the successors to the class whose terms expire shall be elected for a term of three years, so that the term of office of one class shall expire in each year. In the case of any increase in the number of directors, the additional directors shall be elected in the manner provided by the By-Laws, by the directors, or by the stockholders at any annual meet-

("Exhibit A"—Continued)

ing or adjournment thereof; and one-third of their number shall be elected for the then unexpired portion of the term of directors of the first class, one-third for the unexpired portion of the term of directors of the second class, and one-third for the unexpired portion of the term of directors of the third class, so that each class of directors shall be increased equally, except and provided, that in case there is not an even number of directors, then one of the directors shall be in a separate class and shall be elected accordingly. In case of a decrease in the number of directors, one shall be dropped from each class, as near as may be, unless there shall be an odd number of directors, in which case one shall be dropped before any number of any other class may be dropped.

Sec. 3. In case of any vacancy in any class of directors, thru death, resignation or otherwise, the Board of Directors may elect a successor to hold office for the unexpired portion of the term of the director whose office shall be vacant, and until the election of a successor.

Sec. 4. The Board of Directors shall be chosen by the stockholders from their own number at annual meetings or adjournments thereof, and the annual meeting of the stockholders of the company shall be held at two o'clock P.M. at its principle office in Phoenix, Arizona, on the second Tuesday of January of each year, or at such other place in the United States as may from time to

(Exhibit "A"—Continued)

time be designated by the Board of Directors; in accordance with and if permitted by the laws of the State of Arizona. The first annual meeting of the stockholders after the adoption of this Article shall be held on Tuesday, the 17th day of September, 1929, at two o'clock P.M., at the principal office of the company, in Phoenix, Arizona.

Sec. 5. Meetings of the Board of Directors may be held at the principal office of the company in Phoenix, Arizona, or elsewhere, at such place or places in the United States of America as the Board of Directors, from time to time, may determine. Without notice or call, the Board of Directors shall hold its first annual meeting for the year at the place of the regular quarterly meeting of the board then designated as above provided, immediately after the annual stockholder's meeting, or immediately after the election of directors at such annual meeting.

Article XI. Sec. 1. The Board of Directors, at its first meeting after the annual stockholders' meeting or any adjournment thereof, shall elect from its own number a president, may elect from its own number one or more vice-presidents, and shall also elect a treasurer and a secretary, who need not be members of the board, and may elect an assistant treasurer and an assistant secretary, who also need not be members of the board, to hold office for one year next ensuing and until their

("Exhibit A"—Continued)

successors are elected and qualified. The office of vice-president and treasurer or of secretary and treasurer, or of assistant secretary and assistant treasurer, may be held by the same person. All [14] other officers, agents and factors may be appointed for such terms and upon such conditions as the Board of Directors from time to time by resolution shall prescribe.

Sec. 2. The Board of Directors by resolution adopted by a majority of the whole board, may elect from the directors an executive committee. The committee shall consist of one-third of the Board of Directors, including the president, who, by virtue of his office, shall be a member and the chairman thereof. The committee shall, in the interim between the meetings, exercise all powers of that body in accordance with the general policy of the corporation and the direction of the Board of Directors.

Sec. 3. Subject always to the By-Laws made by the stockholders, the Board of Directors may make By-Laws and from time to time alter, amend or repeal any By-Law or By-Laws; but any By-Laws made by the Board of Directors may be altered, amended or repealed by the stockholders in any annual meeting of the company or at any special meeting of the company, provided notice of such proposed alteration, amendment or repeal at any special meeting be included in the notice of such special meeting.

(“Exhibit A”—Continued)

Article XII. The private property of the stockholders of the corporation shall be forever exempt from corporate debts of any kind whatsoever.

Article XIII. The common stock shall be assessable at all times subject to assessment. The same may be assessed from time to time by the directors in any manner and to any extent, and the procedure governing the levy and collection of such assessments shall be as provided by the By-Laws, subject always to the laws of the State of Arizona.

Article XIV. The corporation is incorporated, among other things, for the purpose of consolidating with the Independence Lead Mines, Limited, an Idaho corporation, and for the purpose of taking over the properties of said corporation, and also purchasing the properties of the American Commander Mining and Milling Company, also an Idaho corporation, and the directors of this company shall have full power and authority to effect said consolidation and make said purchase or purchases without consultation with the stockholders of this corporation, so far as permitted by the laws of the State of Arizona.

Article XV. The highest amount of indebtedness or liability to which the corporation is at any time to subject itself is Two Million Five Hundred Thousand Dollars.

Article XVI. This corporation hereby appoints, authorizes, and empowers the Stoddard Incorporat-

(“Exhibit A”—Continued)

ing Company, of Phoenix, its Resident Agent, for the acceptance of service of all necessary process in any action, suit or proceeding that may be had or brought against this company in any of the Courts of the State of Arizona.

In Witness Whereof, We hereunto affix our signatures this 16th day of September, 1929.

[Seal]

C. MARTIN STODDARD

[Seal]

L. MacCALLEN [15]

“EXHIBIT B”

AMENDMENT OF THE ARTICLES
OF INCORPORATION OF
INDEPENDENCE LEAD MINES COMPANY

State of Idaho,

County of Shoshone—ss.

Know All Men By These Presents, That on the 8th day of December, 1931, a meeting of the Board of Directors of Independence Lead Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Arizona, was held at the office of the company in Wallace, Idaho; that at said meeting said Board of Directors, by motion regularly made, seconded and carried, called a special meeting of the stockholders of said corporation to be held in conjunction with the regular annual meeting of said stockholders in Phoenix, Arizona, on the 2nd Tuesday in Janu-

ary, 1932, to-wit, on the 12th day of January, 1932, at the hour of two o'clock P.M., for the purpose of considering and voting upon a proposition to amend Article VIII of the Articles of Incorporation of said company so as to abolish and eliminate all of the "Preferred Stock" provided for and created in and by said Article VIII of said Articles of Incorporation, and to provide for and create, in lieu of such "Preferred Stock," 1,000,000 shares of non-assessable stock to be known as and called "Common Stock—Class A."

That thereafter pursuant to said action by said Board of Directors, and more than thirty days prior to said 12th day of January, 1932, a written notice of the time and place and purpose of such special meeting of the stockholders of said corporation was duly given by the secretary of said company by mailing a copy of such notice to each and every stockholder, that is to say, by depositing in the United States Post Office in Wallace, Idaho, a copy of such notice enclosed in a sealed envelope, with postage prepaid, and addressed to each and every stockholder of said corporation at his or her last known address. That at the time specified in said notice, to-wit, at the hour of two o'clock P.M., on the 12th day of January, 1932, such special meeting of said stockholders of said corporation convened and was held at the office of said corporation in the city of Phoenix, Arizona, pursuant to said call and to said notice, and that said meeting was thereupon adjourned until the

hour of two oclock P.M., on the 10th day of February, 1932, to be held at the same place.

That pursuant to said adjournment said special meeting of the stockholders of said corporation was convened and held at the same hour and place on the 10th day of February, 1932; that at said meeting there were present in person and/or presented by proxies, 1,559,306 shares out of a total of 2,413,025 shares outstanding, the stock represented at said meeting being more than a majority of the total outstanding stock of said corporation.

That at said special meeting of said stockholders a motion was duly made and seconded that the following resolution be adopted: [16]

Be it resolved by the stockholders of the Independence Lead Mines Company, in special meeting assembled, that Article VIII of the Articles of Incorporation of the Independence Lead Mines Company be, and the same hereby is, amended to read as follows:

“The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times, as the Board of Directors may designate, in cash, real or personal property, services, leases, options to purchase, or other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefore, shall thereupon and thereby become and be fully paid as though paid for in cash at par and the

judgment of the directors as to the value of any property, right or thing acquired in exchange for capital stock shall be conclusive.”

“Of said stock, 3,000,000 shares shall be known as and called “Common Stock” and shall have the usual rights pertaining thereto. 1,000,000 shares shall be known as and called “Common Stock—Class A” and shall be non-assessable.

Be it further resolved, that said amendment be signed and acknowledged by the president and attested by the secretary of the corporation and that the same be thereupon filed, recorded and published as required by the laws of the State of Arizona and that the secretary of the company be, and he hereby is, authorized and directed to so file, record and publish said amendment.

And upon being put to a vote the aforesaid motion and resolution were carried and adopted, 1,559,306 shares of stock being voted in favor thereof and there being no shares of stock voted to the contrary.

Wherefore, pursuant to said action by said stockholders’ meeting, be it hereby known:

That Article VIII of the Articles of Incorporation of said Independence Lead Mines Company has been and is amended to read as follows, to-wit:

“Article VIII. The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times as the Board of Directors may designate, in

cash, real or personal property, services, leases, options to purchase, or any other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefore shall thereupon and thereby become and be fully paid as though paid* for in cash at par and the judgment of the directors as to the value of any property, right or thing acquired in [17] exchange for capital stock shall be conclusive.”

“Of said stock, 3,000,000 shares shall be known as and called “Common Stock” and shall have the usual rights pertaining thereto. 1,000,000 shares shall be known as and called “Common Stock—Class A” and shall be non-assessable.”

In witness whereof, the Independence Lead Mines Company has caused these presents to be signed and acknowledged by its president and to be attested by its secretary this 11th day of February, 1932.

INDEPENDENCE LEAD
MINES COMPANY

By W. D. Greenough
Its President.

(Corporate Seal)

Attest:

HERMAN MARQUARDT
Its Secretary. [18]

EXHIBIT "C"

Incorporated
Under the Laws of
the State of Arizona

Number Shares
Class "A"

INDEPENDENCE LEAD MINES COMPANY
MINES AT MULLAN, IDAHO

Capitol Stock \$4,000,000
Shares \$1.00 Each

This certifies that is the
owner of
Shares of the Capital Stock of Independence Lead
Mines Company transferrable only on the books of
this Corporation in person or by Attorney upon
surrender of this Certificate properly endorsed.

In witness whereof, the said Corporation has
caused this Certificate to be signed by its duly
authorized officers and its Corporate Seal to be
hereunto affixed this day of
..... A. D. 19.....

.....
President

.....
Secretary

Shares \$1.00 each
Transfer Office
Wallace, Idaho

[Endorsed]: Filed June 23, 1945. [19]

[Title of Court and Cause]

MOTION TO DISMISS

Comes now the defendant and moves to dismiss the above entitled action upon the following grounds, to-wit:

1. That the above entitled court lacks jurisdiction over the subject matter of said action as set out in the plaintiff's complaint herein.

2. That the above entitled court lacks jurisdiction over the persons of all of the parties to said action.

3. That the plaintiffs' complaint fails to state a claim upon which relief can be granted.

Wherefore, plaintiff prays that said action be dismissed and that the plaintiffs take nothing thereby and that defendant have and recover its cost herein expended.

CHAS. E. HORNING

F. C. KEANE

Attorneys for Defendant.

(Service accepted.)

[Endorsed]: Filed July 25, 1945. [20]

[Title of Court and Cause]

ORDER

Defendant's motion to dismiss having come on for hearing and having been presented fully by Counsel for defendant and Plaintiffs. At the conclusion of the oral presentation the matter was taken under advisement by the Court. After due consideration and being fully advised, it is ordered

that the Motion to Dismiss be and the same hereby is denied.

The Defendant may have ten days from date hereof in which to file its answer.

Dated November 30, 1945

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed Nov. 30, 1945. [21]

[Title of Court and Cause]

MOTION FOR DEFAULT

The Plaintiffs move the Court as follows:

1. For an Order entering the default of defendant herein, it having failed to plead or otherwise defend this action as provided by the rules and order of this Court.

2. For an order setting said cause for hearing upon plaintiffs' complaint herein.

This motion is based upon the affidavit of H. J. Hull, served and filed herewith, and upon all of the records and files in this case.

Dated at Wallace, Idaho, this 27th day of April, 1946.

H. J. HULL,
Attorney for Plaintiffs.

NOTICE OF MOTION

To Independence Lead Mines Company, a corporation, and

To F. C. Keane and C. E. Horning, Its Attorney:

Please take notice, that the undersigned will bring the above motion on for hearing before the Court at the United States District Court Room in the Federal, or Post Office Building, in the City of Boise, Idaho, on the 3rd day of May, 1946, at the hour of 3:30 o'clock P. M. on said day, or as soon thereafter as counsel can be heard.

H. J. HULL,
Attorney for Plaintiffs.

(Receipt acknowledged.)

[Endorsed]: Filed April 29, 1946. [22]

[Title of Court and Cause]

AFFIDAVIT OF H. J. HULL

(Attached to Motion & Notice)

State of Idaho,
County of Shoshone—ss.

H. J. Hull, being first duly sworn says:

That he is an attorney at law, duly admitted to practice in the above named Court, and that he is the attorney for plaintiffs in the above entitled case. That affiant maintains his office at Wallace, Idaho.

As more fully appears from the records and files herein, on the 30th day of November, 1945, an order was entered in this cause denying Defendant's motion to dismiss said action and granting the defendant ten days from the 30th day of November, 1945, within which to file its answer herein.

Subsequent to the entry of said order attorneys for the defendant, Mr. C. E. Horning and Mr. F. C. Keane, on several occasions requested of affiant extensions of time within which to serve and file defendant's answer, and on each occasion affiant agreed to a short extension. The last of said requests and extension was made on the 10th day of January, 1946, at which time affiant agreed that defendant might have to and including the 17th. day of January, 1946, within which to serve and file its Answer.

On each of these occasions affiant advised counsel for defendant that he was very reluctant to consent to such extensions for the reason that plaintiffs could not prepare for the trial of said cause until they had received defendant's answer and were advised of the defense, if any, intended to be asserted to the complaint herein. On January 10th. 1946, when the extension last referred to was agreed upon, counsel for defendant assured affiant that they would not request any further [23] extension and would serve and file defendant's answer on or before the 17th of January, 1946, without fail.

Defendant failed to serve or file its answer within the time agreed upon between affiant and defendant's counsel, or at all, and no answer has been served or filed herein.

This affidavit is made in support of plaintiffs'

motion for an order directing the entry of the defendant's default herein.

H. J. HULL

Subscribed and sworn to before me this 27th day of April, 1946.

[Seal]

GEORGE W. TABOR

Notary Public in and for the State of Idaho, residing at Wallace, Idaho. [24]

[Title of Court and Cause]

ANSWER

Comes now the above named defendant and for answer to plaintiffs' complaint admits, denies and alleges:

I.

This answering defendant admits the allegations contained in Paragraph I of plaintiffs' complaint but denies that this Honorable Court has jurisdiction over the above entitled action for the reason that the said defendant is a corporation organized under the laws of Arizona and that all of the subject matter of this complaint involves the internal affairs of the corporation.

II.

Defendant admits Paragraph II of said complaint.

III.

Defendant admits the allegations contained in Paragraph III of said complaint.

IV.

Defendant denies each and every allegation con-

tained in Paragraph IV of said complaint.

V.

Answering Paragraph V of said complaint, this answering defendant denies that for value received or for any other consideration whatsoever, all said 1,000,000 shares of common stock, Class A, evidenced by its certificate No. 350 to the Mines Finance Corporation, an Idaho corporation, or anyone else, was lawfully issued.

Defendant further denies that on the 31st day of December, 1941, or at any other time whatsoever or at all, the Mines Finance Corporation assigned or transferred 666,667 or said purported common stock, Class A, to the plaintiff, Alma R. Kingsbury, or anybody else, and assigned or transferred 333,333 shares thereof to one Herman Marquardt, deceased husband of [25] the plaintiff Olga Marquardt, and denies that defendant re-issued said 666,667 shares to the plaintiff, Alma R. Kingsbury or anyone else as evidenced by its certificate No. 7351, and 333,333 shares to the said Herman Marquardt or anyone else evidenced by its certificate No. 7350 but admits that a full, true, and correct copy of the form of said certificates as evidence of said common stock, Class A, is attached to plaintiffs' complaint and marked "Exhibit C." In this connection, this answering defendant alleges that said corporation, Mines Finance Corporation, has never been dissolved and that this answering defendant has never been advised nor has there been any proof submitted to this answer-

ing defendant as to whom the shareholders in Mines Finance Corporation actually were or are, that no action has ever been instituted for the dissolution of said corporation and that at no time has this corporation ever been advised by judicial action that either of the plaintiffs in this action or their predecessors in title had any right, title, or interest in and to said shares of stock in said defendant corporation and that at the time that said certificates were so issued as hereinabove set forth, the said Herman Marquardt was the alter ego of said Independence Lead Mines Company, or of the defendant, and that said certificate mentioned as being set over to the said Alma R. Kingsbury was so executed, it was done without any knowledge on the part of the said defendant corporation or its other officers and that it constituted a fraud on the defendant corporation and that at the time the said Olga Marquardt secured her stock in said defendant corporation, that said action was taken thereon accounts, with reference to said transaction were handled by the said Herman Marquardt, now deceased, who at said time was the alter ego of said corporation, and that the defendant has never been advised and is not now advised as to whom the stockholders [26] of Mines Finance Corporation actually were or whether said corporation was entitled to make said transfer or whether said corporation is indebted to any person whatsoever or at all, and that by said purported action, said Mines Finance Corporation, acting through its alter ego, Herman Marquardt, and the plaintiff,

Alma R. Kingsbury, attempted to dispose of all of the assets of said Mines Finance Corporation and that by permitting said transfer to so stand, this answering defendant would become liable to any stockholders which said Mines Finance Corporation might have other than the said Herman Marquardt, now deceased, or Alma R. Kingsbury.

VI.

Answering Paragraph VI of said complaint, this answering defendant admits that said certificate therein mentioned was presented for transfer but at the time that the same was presented, the officers of the answering defendant were not aware of the true state of facts existing with reference to the same.

VII.

Answering Paragraph VII, defendant denies each and every allegation therein contained.

VIII.

Defendant denies that 1,000,000 shares of the authorized common stock, Class A, has been issued and is now outstanding and alleges that if said 1,000,000 shares of Class A stock is now outstanding, that the same is void and of no effect.

IX.

Answering Paragraph IX, defendant admits the allegations contained therein.

X.

This answering defendant admits the allegations contained in the first paragraph of Paragraph X

but denies each and every allegation contained in the second paragraph of said Paragraph X. [27]

XI.

This answering defendant denies that the said plaintiff, Alma R. Kingsbury, has ever made a demand upon defendant for the transfer and issuance to her of Clayton Silver Mines stock on the basis of one share of Clayton for Four shares of defendant corporation but admits that the plaintiff, Olga Marquardt, has made such demand upon said corporation.

This answering defendant admits that said defendant has refused to admit that the said stock, Class A, purportedly owned by plaintiffs is entitled to any Clayton stock.

XII.

Defendant denies the allegations contained in Paragraph XII of said complaint.

XIII.

Defendant admits the value of 250,000 shares of Clayton Silver Mines stock at the time of the refusal of the defendant to transfer same to the plaintiffs, was the sum of \$150,000.00. Defendant also admits that the Clayton company has declared and paid a dividend of 1½c per share on said 250,000 shares but denies that the plaintiffs or either of them has been damaged by reason of defendants refusal to transfer said stock to said plaintiffs in the sum of \$153,000.00 or any other sum whatsoever or at all.

Wherefore, defendant having fully answered

plaintiffs' complaint, prays that the same be dismissed with prejudice to the commencement or the prosecution of another action and that defendant do have and recover its costs herein incurred.

CHAS. E. HORNING,
EUGENE F. McCANN,
F. C. KEANE,
Attorneys for Defendant.

W. H. LANGROISE

Residence and Post Office Address Boise, Idaho.

(Duly verified.)

[Endorsed]: Filed April 29, 1946 [28]

[Title of Court and Cause]

AMENDMENT TO COMPLAINT

The plaintiffs, by leave of the Court first hand and obtained, do hereby amend their original complaint, filed herein June 23, 1945, in the following particulars:

Paragraph XIII of said complaint is amended to read as follows:

XIII.

The reasonable value of said 250,000 shares of Clayton stock at the time defendant refused to deliver same to the plaintiffs, as hereinbefore alleged, was \$150,000.00. Said Clayton stock is registered and listed upon the Standard Stock Exchange of Spokane, Washington, and is regularly and extensively traded and dealt in by the public and its

market value is quoted daily upon said exchange.

That on the 18th day of February, 1946, said Clayton stock was quoted and traded upon said Standard Stock Exchange at \$1.50 per share, making the total value of said 250,000 shares, on that date, \$375,000.00.

That on the 1st. day of May, 1946, said stock was quoted and traded upon said Standard Stock Exchange, at \$1.04, making the total value of said 250,000 shares, on that date, \$260,000.00.

That since the distribution of said Clayton stock was authorized by the defendant, and subsequently to plaintiffs' demand therefore, as hereinbefore alleged, the Clayton Silver Mines, Inc., declared and paid a dividend of one-half cent per share and the dividend attributable to said 250,000 shares, amounting to \$3,000.00, was paid to and wrongfully received and retained by the defendant corporation, and it *has* failed and refused to account to these plaintiffs therefor.

Plaintiffs hereby amend the prayer to their complaint to read as follows: [29]

Wherefore, Plaintiffs pray for the judge or decree of this Court:

1. That the defendant, Independence Lead Mines Company be ordered and directed to forthwith distribute and deliver to these plaintiffs 250,000 shares of the capital stock of the Clayton Silver Mines, Inc., and account to the plaintiffs, and pay to them, the sum of Three Thousand (\$3,000.00) Dollars, being the dividend declared and paid thereon as herein alleged.

2. In the event defendant is unable to deliver said 250,000 shares of Clayton stock to the plaintiffs in full, that then said judgment or decree order and direct the defendant to make the plaintiffs whole with respect to so many shares of said stock as the defendant is unable to deliver to the plaintiffs by payment to plaintiffs of such sum as the Court shall determine meet and equitable, or by such other means as the Court shall determine.

3. For such other and further relief as to the Court shall seem equitable.

4. For the costs and disbursements of this action.

H. J. HULL,
Attorney for Plaintiffs.

(Service acknowledged.)

[Endorsed]: Filed May 22, 1946. [30]

[Title of Court and Cause]

STIPULATION

It is hereby stipulated by and between the parties to the above entitled action, acting through their respective attorneys, that upon the filing of this stipulation judgment and decree may be entered in favor of the plaintiffs and against the defendant as follows, each party expressly waiving Findings of Fact and Conclusions of Law:

I.

That judgment be entered denying plaintiffs' claim or right to recover from the defendant 250,-

000 shares of the capital stock of Clayton Silver Mines and that plaintiffs do have and recover from the defendant 170,000 shares of said capital stock of Clayton Silver Mines and no more.

II.

It is further stipulated and agreed that judgment be entered that the plaintiff, Alma R. Kingsbury, surrender to defendant 266,667 shares of Common Class A stock in defendant corporation and that plaintiff, Olga Marquardt, surrender 133,333 shares of said Class A Common stock in defendant corporation to defendant, all of said shares so surrendered to become the property of defendant corporation.

III.

That it be further adjudged and decreed that the plaintiff, Alma R. Kingsbury, is the bona fide owner of 400,000 shares of Common Class A stock of the defendant, Independence Lead Mines Company, and that the plaintiff, Olga Marquardt, is the bona fide owner of 200,000 shares of the Common Class A stock of said corporation.

IV.

That the Common Class A stock of defendant corporation, including the shares thereof owned by the plaintiffs, has and is entitled to the same identical rights, privileges and benefits as the Common stock of the defendant corporation, [31] share and share alike, the only difference and distinction between the said Common stock and Common Class A stock being that the latter is non-assessable.

V.

That a decree be entered ordering and directing the defendant corporation to pay to the plaintiffs, Alma R. Kingsbury and Olga Marquardt, the sum of \$10,050.00 and that said plaintiffs do have and recover judgment against the said defendant for said amount of \$10,050.00.

VI.

That each of the parties shall pay her and its own costs.

Dated this 22 day of June, 1946.

H. J. HULL,
Attorney for Plaintiffs.

F. C. KEANE,
EUGENE F. McCANN,
CHAS. E. HORNING,
Attorneys for Defendant.

[Endorsed]: Filed June 29, 1946. [32]

In the United States District Court for the Dis-
trict of Idaho, Northern Division

No. 1603

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,
a corporation,

Defendant.

JUDGMENT AND DECREE

This cause came on to be heard upon the pleadings at Coeur d'Alene, Idaho, the 24th day of June, 1946, before the Court sitting without a jury, the plaintiffs being represented by their attorney, H. J. Hull, and the defendant by its attorneys, F. C. Keane, Eugene F. McCann and Chas. E. Horning.

Thereupon the parties filed herein their stipulation that judgment be entered herein in favor of the plaintiffs and against the defendant, and the Court having examined the pleadings, and the stipulation, and having heard and considered the evidence adduced in support thereof, and being now fully advised in the premises:

It is hereby ordered, adjudged and decreed and this does order, adjudge and decree:

I.

That the plaintiffs' claim of right to recover

from the defendant 250,000 shares of the capital stock of Clayton Silver Mines be and it hereby is denied and that plaintiffs do have and recover from defendant 170,000 shares of said Clayton Silver Mines capital stock and no more.

II.

It is further ordered that the plaintiff, Alma R. Kingsbury, surrender to defendant corporation 266,667 shares of Common Class A stock in defendant corporation and that the plaintiff, Olga Marquardt, surrender 133,333 shares of said Common Class A stock in defendant corporation to the defendant corporation, all of said shares so surrendered to become the property of defendant corporation.

III.

It is further ordered and this does order that the above named plaintiffs do have and recover judgment against defendant, [33] Independence Lead Mines Company, for the sum of \$10,050.00.

IV.

That plaintiff, Alma R. Kingsbury, is the bona fide owner of 400,000 shares of the Common Class A stock of the defendant, Independence Lead Mines Company, and that the plaintiff, Olga Marquardt, is the bona fide owner of 200,000 shares of the Common Class A stock of the defendant, Independence Lead Mines Company. That the Common stock "Class A" of the defendant, Independence Lead Mines Company, including the 600,000 shares owned by the plaintiffs, as aforesaid, has, possesses, and is entitled to the same and identical rights, privileges and benefits, share

for share, as the Common stock of the said Independence Lead Mines Company, the only difference or distinction between the Common Stock and the Common Stock Class "A" being that the latter is not subject to assessment.

V.

That each party pay her and its own costs.

Dated and done at Coeur d'Alene, Idaho, this 24th day of June, 1946.

CHASE A. CLARK,
Judge.

[Endorsed): Filed June 29, 1946. [34]

[Title of Court and Cause]

MOTION TO VACATE AND SET ASIDE
JUDGMENT AND REOPEN SAID CAUSE
TO ALLOW INDEPENDENCE LEAD
MINES COMPANY TO FILE A PROPER
ANSWER AND TO REOPEN SAID CAUSE
FOR TRIAL.

Now comes the above named defendant, Independence Lead Mines Company, an Arizona Corporation, and petitions this Court to vacate and set aside the judgment heretofore rendered on the 24th day of June, 1946, by stipulation without argument or trial, for the following reasons, to-wit:

I.

That said judgment provides for the distribution to said plaintiff, Alma Kingsbury, of 400,000 shares

of stock of the defendant Company known as "Class 'A' Non-assessable Common Stock" and also provides for the distribution to Olga Marquardt of 200,000 shares of such stock and said defendant Company alleges that no consideration has ever been paid to said Company for said stock and the same is wholly without consideration and void and if said judgment is to stand the said judgment should be amended to provide for the payment unto the defendant Company by said plaintiff, Alma Kingsbury, of \$400,000.00 in lawful money of the United States of America and the payment to said defendant Company by said plaintiff, Olga Marquardt, of the sum of \$200,000.00 in lawful money of the United States of America, so as to make the said stock fully paid; where otherwise the said stock is a fraud upon the stockholders of the said defendant Company and is wholly without consideration and should be returned to the treasury of the said defendant Company.

II.

That at the time of the incorporation of the said defendant Company under the laws of the State of Arizona a capitalization of said Company was made with 3,000,000 shares of "Common Assessable Stock" of the par value of \$1.00 per share and 1,000,000 shares of stock called "Preferred, Non-Assessable Stock" of the par value of \$1.00 per share and later [35] on or about the 10th day of February, 1932, said Articles of Incorporation were amended so as to provide that the said "Non-

assessable Preferred Stock'' of the par value of \$1.00 per share would surrender its preference and would become and would be known as "Class 'A' Non-Assessable Common Stock'' of the par value of \$1.00 per share; and representations were made at said time to all of the stockholders by its officers, including its President and Secretary, that the said stock would be held in the treasury of the Company as unpaid treasury stock subject only to being transferred or exchanged by the said defendant Company in the purchase of other mining properties from time to time during the existence of the said defendant Company.

That no new properties were ever purchased by the defendant Company in accordance with the expressed intention and representations of the officers and directors and trustees of the said Company to make said stock fully paid and said stock was and is wholly unpaid and should be returned to the treasury of the Company.

That during the year 1923, or thereabouts, Henry B. Kingsbury and Herman Marquardt, being then and there the President and Secretary, respectively, of the Independence Lead Mines, Ltd., an Idaho corporation, predecessor in interest to the mining properties of the defendant Company in the Hunter Unorganized Mining District in Shoshone County, Idaho, formed a corporation under the laws of the State of Idaho under the name of Mines Finance Company, and the said Henry B. Kingsbury became the President thereof and the said Herman Marquardt became the Secretary and

Treasurer thereof, and the said Kingsbury and the said Marquardt became and were the sole stockholders of said Mines Finance Company. [36]

That the objects and purposes of the said Mines Finance Company were to take and receive all funds secured by the levying of assessments on the common stock of the Independence Lead Mines, Ltd., and to disburse the same under the direction and for the use and purposes of the President and Secretary of the said Mines Finance Company, being Henry B. Kingsbury and Herman Marquardt, who were the sole stockholders thereof, without any regard to the purposes for which said assessments were levied and to defraud the stockholders of the Independence Lead Mines, Ltd., of all control of the funds so secured by the levying of assessments and which said funds should have been deposited to the credit of the said Independence Lead Mines, Ltd. in its own treasury; and the said Mines Finance Company had no other source of revenue or income whatsoever; and the said Mines Finance Company continued to carry out such course of action until the formation of the present Company under the laws of the State of Arizona, being the defendant Company herein, and after the organization of said defendant Company the said Henry B. Kingsbury, Manager or President and controlling officer of both the Independence Lead Mines, Ltd. and the defendant Company, and Herman Marquardt, Secretary and Treasurer of said Companies; and likewise President and Secretary and Treasurer, respectively, of the Mines

Finance Company, continued to levy assessments upon the assessable stock of the defendant Company and to place said funds as levied in the Mines Finance Company for disbursement for their own purposes and accounts and in fraud of the assessable stockholders of the defendant Company; and between the time of the formation of the defendant Company and the end of the year 1938, the said Kingsbury and Marquardt levied thirteen (13) assessments upon the assessable stock of the defendant Company in the sum of 1c or 2c per share, amounting to [37] many thousands of dollars of money levied upon and from the stockholders owning and holding the assessable common stock of the defendant Company and no assessments levied were ever levied upon or paid by the so-called "Class 'A' Non-assessable Common Stock" of the defendant Company and said stock is wholly unpaid and without any consideration.

III.

That at some time during or after the year 1930, the said Kingsbury and the said Marquardt, being then and there the Manager and Secretary of the defendant Company and directors and officers of said Company, and being then and there in complete control of the defendant Company and at the same time being, respectively, the President and Secretary of the Mines Finance Company and the sole stockholders thereof and in complete control thereof, for the purpose of unlawfully and illegally acquiring for themselves the ownership of

the said 1,000,000 shares of "Class 'A' Non-assessable Stock" of the defendant Company, and in violation of all representations heretofore alleged to have been made to the holders of common assessable stock, caused the same to be transferred to the Mines Finance Company of which the said Kingsbury and the said Marquardt were, respectively, President and Secretary and officers and directors thereof, and the sole stockholders thereof, without any consideration of any kind whatsoever being given for the said stock by the Mines Finance Company or the said Kingsbury or the said Marquardt, or any of them, and the said "Class 'A' Non-assessable Common Stock" of the defendant Company remained and is wholly unpaid and constitutes and is a fraudulent issue of stock of said defendant Company; and upon and against the holders of the common assessable stock of said defendant Company.

IV.

That the said Henry B. Kingsbury died during the month of June, 1940 leaving as his widow and sole heir at law the plaintiff, Alma Kingsbury, and the said Alma Kingsbury [38] thereupon, through probate, became the owner of the stock in the Mines Finance Company theretofore held by her husband, Henry B. Kingsbury, and became an officer and director and stockholder in said Mines Finance Company.

That on or about the 31st day of December, 1941 the said Alma Kingsbury, being then and there an officer and director of the Mines Finance Com-

pany and the holder of two-thirds of the stock of said Mines Finance Company, and the said Herman Marquardt being then and there an officer and director of the Mines Finance Company and the owner of the remaining stock thereof, being a one-third interest in the stock of the said Company, conspired together and caused to be issued unto themselves, without any consideration whatsoever, the "Class 'A' Non-Assessable Common Stock" of the defendant Company, being 1,000,000 shares of stock of the par value of \$1.00 per share, for which no consideration had ever been paid into the treasury of the defendant Company and issued two-thirds of said "Class 'A' Non-Assessable Common Stock", being 666,666 $\frac{2}{3}$ shares of stock to Alma Kingsbury and 333,333 $\frac{1}{3}$ shares of stock to the said Herman Marquardt; and the same was then and is now a continuing fraud upon the stockholders of the defendant Company and the holders of the common assessable stock thereof.

That on or about the 29th day of August, 1942, the said Herman Marquardt died testate in the County of Shoshone, State of Idaho, leaving as his sole heir his wife, Olga Marquardt, who succeeded to the ownership of said one-third share of the 1,000,000 shares of "Class 'A' Non-Assessable Common Stock" of the defendant Company in fraud of the rights of the holders of the common assessable stock of the defendant Company and without any consideration of any kind being paid therefor.

V.

That the said Henry B. Kingsbury and the said

Herman Marquardt, being then and there officers, directors and trustees of the defendant Company in carrying out their intent to defraud [39] the holders of the common assessable stock of the defendant Company and to defraud the said Company, illegally and against the laws of the State of Arizona and the State of Idaho, presented and issued and signed as President and Secretary all certificates of stock in the defendant Company as common stock of the par value of \$1.00 per share of 4,000,000 shares and did not print, or cause to be printed, upon said certificates or any of them, as required by the laws of the State of Arizona and the State of Idaho and the general laws of the states forming the United States of America, the differentiation in the classes of the two stocks so as to show to the stockholders and the purchasers of said stock that 3,000,000 shares of the common stock of the defendant Company were assessable stock and 1,000,000 shares of stock so held by the Mines Finance Company and later transferred to the plaintiffs, Alma Kingsbury and Olga Marquardt, as hereinbefore set forth, were non-assessable stock of the par value of \$1.00 per share for 1,000,000 shares, designated and shown as "Class 'A' Non-Assessable Common Stock" and thereby worked a fraud upon the holders of the 3,000,000 shares of assessable common stock, which fraud is a continuing one; the intent and purpose of said Kingsbury and said Marquardt being thereby through the ownership of said "Class 'A' Non-Assessable Common Stock" to remain in perma-

ment control of said Company without paying assessments while levying unlimited assessments on the common assessable stock and the said stockholders had no knowledge of the difference in the classes and values of said stock and all of the said stock being 1,000,000 shares of "Class 'A' Common Stock" is a fraudulent issue and should be set aside and returned to the treasury of the said Company for cancellation as non-assessable stock.

VI.

That the defendant Company, the Independence Lead Mines Company, since the death of Herman Marquardt in August, 1942, has been under the control and domination of F. C. Keane, [40] of Wallace, Idaho, who acted as President of the Independence Lead Mines Company without any right or authority, as he was not a stockholder in said Company and had not been since sometime in the year 1940 and the said F. C. Keane, without any right or authority, appointed as so-called co-Directors of the defendant Company, Glynn D. Evans and William Mullen of Wallace, Idaho, who served as officers and directors of said Company unlawfully and without any right or authority as neither the said Evans or the said Mullen were ever, at any time, stockholders of the Independence Lead Mines Company and had no right or authority to act as such directors or officers.

That in September, 1944, the said so-called Board of Directors of the Independence Lead Mines Company caused a dividend to be declared from the treasury of the Company of 686,175 shares of stock

of the Clayton Silver Mines Company and caused the same to be paid to the stockholders of said Company then outstanding holding the 2,744,700 shares of issued assessable common stock of defendant Company; and held, undeclared in the treasury of said defendant Company 314,825 shares of Clayton stock. Prior to the stipulation and judgment entered in this action, the said F. C. Keans had sold 218,000 shares of Clayton stock belonging to the treasury of the defendant Company and had converted the sales price of said stock to his own account and to his own personal use and benefit.

That at the time of the stipulation and judgment entered in this action the defendant Company had left in its treasury 96,825 shares of Clayton stock and had under its control 73,175 shares of Clayton previously declared, as above set forth, as a dividend to the common assessable stockholders, but as of that time undistributed.

That said 73,175 shares of Clayton were held in trust by the defendant Company and its then so-called officers for stockholders of the common assessable stock.

That on or about the 23rd day of June, 1945, the said Alma Kingsbury and Olga Marquardt, being then and there the [41] holders of said "Class 'A' Non-assessable Common Stock", as aforesaid, caused this action to be instituted in this Court against the Independence Lead Mines Company, defendant, and the said defendant appeared through its President, F. C. Keane, in said cause

and by answer alleged that the said issuance of said "Class 'A' Common Stock" and the holding thereof by the said plaintiffs, Alma Kingsbury and Olga Marquardt, was fraudulent and a fraud upon the holders of the common assessable stock of the said Company and thereafter, without argument and without trial, the said F. C. Keane, and the so-called Board of Directors of the defendant Company entered into a stipulation with the said plaintiffs by and through their attorney, H. J. Hull, of Wallace, Idaho, to settle the said controversy without argument or trial by allotting to the plaintiff, Alma Kingsbury, 400,000 shares of the "Class 'A' Non-Assessable Common Stock" of the Independence Lead Mines Company and by allotting to the said plaintiff, Olga Marquardt, 200,000 shares of the "Class 'A' Non-Assessable Common Stock" of the Independence Lead Mines Company and by further allowing and awarding to said plaintiffs in said proportion 170,000 shares of stock of the Clayton Silver Mines Company and by further allowing and awarding to said plaintiffs the sum of \$10,050.00 and causing judgment to be entered and rendered against the defendant Company, in accordance with the terms of said stipulation aforesaid; and this Court, on the 24th day of June, 1946, entered such judgment in accordance with said stipulation and the defendant Company, the Independence Lead Mines Company, now asserts that the said judgment is fraudulent and is a fraud upon this Court and this defendant Company, and makes this motion to set aside the same so this

defendant can assert its lawful rights and defend and protect the rights of the holders of the common, assessable stock of this defendant Company; that no disclosure was made to this Court that the award of 170,000 shares of Clayton to the plaintiffs would deprive common assessable stockholders of [42] a dividend previously declared, in the amount of 73,175 shares of Clayton which was a trust for said common stockholders held by the defendant Company and its so-called President, F. C. Keane.

VII.

That F. C. Keane, acting as President of the defendant Company, the Independence Lead Mines Company, was in complete control thereof and had sold and disbursed all of the assets of said Company for his own use and benefit, as set forth in the complaint for Receivership, now pending in this Court in the case of L. J. Hopkins et al vs. Independence Lead Mines Company, et al, being Civil Cause No. 1687 to which reference is hereby made. And the said plaintiffs, well knowing that no stockholders' meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by the said Keane was illegal and void.

VIII.

That Chase A. Horning, of Wallace, Idaho, acting as one of the attorneys for the defendant, was

paid and received the sum of \$10,000.00 from the said defendant in said settlement; and the said F. C. Keane, acting as one of the attorneys for said defendant, also received the sum of \$10,000.00 from said defendant.

IX.

That the said plaintiffs have never carried out the terms of settlement incorporated in the judgment of this Court on June 14, 1946 in that they have never returned, or offered to return, to the treasury of the defendant Company, 400,000 shares of "Class 'A' Non-Assessable Common Stock" as provided in said judgment.

X.

That the said 1,000,000 shares of "Class 'A' Common Non-Assessable Stock" was transferred by them, the officers of [43] the defendant Company, as is more fully set forth in paragraph III herein, and in complete control thereof, acting in collusion with themselves as officers of the Mines Finance Company and in complete control thereof and without any right or authority and the same is wholly void.

That the facts in regard to this transfer and other matters set out herein were never disclosed or discovered until after the new Board of Directors of the Independence Lead Mines Company were elected on the 26th day of May, 1947 and had acquired some of the books and documents and papers of the said Company; that all of the books of said Company have not, as yet, been turned over to the new Board of Directors.

That F. C. Keane, as one of the attorneys of record for the defendant Company, as well as its President and dominating director, by his actions prevented the defendant Company from presenting its defenses to this Court; that said F. C. Keane by filing his answer in this cause and by allegations therein contained caused stockholders to believe said matter would be contested; that the later stipulation and judgment prevented stockholders from intervening in this cause; that the true state of affairs as regards the giving to the plaintiffs of the 73,165 shares of Clayton held in trust for common, assessable stockholders was not, and could not be, discovered until a new Board of Directors took possession of the books and records of the Company, as all facts were concealed by said Keane, for his own purposes and against the rights and in fraud of the interests and rights of the assessable stockholders of said Company and in fraud of this Court.

Wherefore, Independence Lead Mines Company, defendant, prays that the Court enter an order in the above entitled case providing as follows:

- 1 . That the judgment of the Court heretofore entered in the above entitled cause on the 24th day of June, 1946, be [44] vacated and set aside and held for naught.

2. That the parties hereto be restored to the same status as that obtaining upon the filing of the complaint in the above entitled case.

3. That defendant, Independence Lead Mines

Company, be granted twenty days following any order of this Court vacating and setting aside the judgment heretofore rendered, for the purpose of pleading to said complaint by motion or answer as provided in the Federal Rules of Civil Procedure.

4. For such other relief as to the Court may seem just and equitable in the premises.

R. MAX ETTER,

WILLIAM E. CULLEN,

Attorneys for Defendant.

(Duly verified.)

[Endorsed]: Filed June 23, 1947.

RETURN ON SERVICE OF WRIT

Filed July 3, 1947

United States of America,

District of Idaho—ss:

I hereby certify and return that I served the annexed Motion to vacate and request for new trial on the therein-named Olga Marquardt by handing to and leaving a true and correct copy thereof with her personally at Wallace, Idaho in said District on the 28th day of June, A. D. 1947.

EVERETT M. EVANS

U. S. Marshal.

By J. Bruce Blake, Deputy.

RETURN ON SERVICE OF WRIT

Filed July 3, 1947

United States of America,

District of Idaho—ss:

I hereby certify and return that I served the

annexed [45] Motion to vacate and request for new trial on the therein-named Alma Kingsbury by handing to and leaving a true and correct copy thereof with her personally at Wallace, Idaho in said District on the 25th day of June, A. D. 1947.

EVERETT M. EVANS

U. S. Marshal,

By J. Bruce Blake, Deputy. [46]

[Title of Court and Cause]

MOTION TO DISMISS DEFENDANT'S PETITION FOR ORDER SETTING ASIDE JUDGMENT.

The plaintiffs move the Court as follows:

1. To dismiss the defendant corporation's petition (so-called motion) for an order setting aside the judgment to state a claim against plaintiffs upon which relief can be granted.

H. J. HULL,

Attorney for Plaintiffs.

[Endorsed]: Filed Sept. 12, 1947. [47]

[Title of Court and Cause]

AMENDMENT TO MOTION TO VACATE AND SET ASIDE JUDGMENT AND REOPEN SAID CAUSE TO ALLOW INDEPENDENCE LEAD MINES COMPANY TO FILE A PROPER ANSWER AND TO REOPEN SAID CAUSE FOR TRIAL.

The defendant does hereby amend its original

“Motion to Vacate and Set Aside Judgment and Reopen Said Cause for Trial”, filed herein on June Mines Company to File a Proper Answer and to Reopen Said Cause for Trial”, filed herein on June 23, 1947, in the following particulars:

Paragraph VI of said petition is amended to read as follows, to-wit:

VI.

“That the defendant Company, the Independence Lead Mines Company, since the death of Herman Marquardt in August, 1942, has been under the control and domination of F. C. Keane, of Wallace, Idaho, who acted as President of the Independence Lead Mines Company without any right or authority, as he was not a stockholder in said Company and had not been since sometime in the year 1940, and the said F. C. Keane, without any right or authority, appointed as so-called co-directors of the defendant Company, Glynn D. Evans and William Mullen of Wallace, Idaho, who served as officers and directors of said Company unlawfully and without any right or authority as neither the said Evans or the said Mullen were ever, at any time, stockholders of the Independence Lead Mines Company and had no right or authority to act as such directors or officers.

That the said defendant is in possession of a sworn and verified written statement, dated November 29, 1947, made by William Mullen of Wallace, Idaho, that he was never appointed a [48] Director of the Independence Lead Mines Company and never acted as such Director and never

had any knowledge that he had been so appointed a Director or was held out to be a Director until long after the judgment had been entered in this controversy and that he never acted as a Director in any way; the said defendant has also in its possession an affidavit by Glynn D. Evans of Wallace, Idaho, dated November 29, 1947, to the effect that he never knew of any of the sales of the stock of the Clayton Silver Mines Company owned by the Independence Lead Mines Company being made and never authorized or agreed to the same.

That in August, 1944, the so-called Board of Directors of the Independence Lead Mines Company, or at least F. C. Keane and Glynn D. Evans, caused a dividend to be declared from the treasury of the Company of stock of the Clayton Silver Mines Company, and that a portion of the meeting of the Board of Directors of that date is hereinafter quoted:

“Whereas, the stockholders of Independence Lead Mines Company are insistent upon the distribution of a substantial portion of said Clayton Silver Mines stock,

“Now therefore, be it resolved that a distribution of 750,000 shares of the capital stock of Clayton Silver Mines be made to the common stockholders of Independence Lead Mines Company on the basis of one (1) share of Clayton Silver Mines for four (4) shares of Independence Lead Mines Company stock held by all comon stockholders, said distribution to commence on the 20th day of September, 1944 and that the shareholders of this

company be required to send in their Independence Lead Mines Company stock for the purpose of receiving the Clayton dividend and that the Secretary stamp the Independence Lead Mines Company certificates so sent in showing that the Clayton Silver Mines distribution on said stock had been effected.

“Be it further resolved that the Class A common stock of Independence Lead Mines Company do not participate in such distribution for the reason that there is a question as to validity of said Class A common stock.”

That at the time of said meeting and the dividend declared thereat, there were outstanding 2,744,700 shares of issued [49] assessable common stock of defendant company. The Company, after setting enough Clayton aside for this dividend had left undeclared in its treasury 314,825 shares of Clayton stock. Prior to the stipulation and judgment entered in this action, the said F. C. Keane had sold 218,000 shares of Clayton stock belonging to the treasury of the defendant Company and had converted the sales price of said stock to his own account and to his own personal use and benefit.

That at the time of the stipulation and judgment entered in this action the defendant Company had left in its treasury 96,825 shares of Clayton stock and had under its control 73,175 shares of Clayton previously declared, as above set forth, as a dividend to the common assessable stockholders, but as of that time undistributed.

That said 73,175 shares of Clayton were held in

trust by the defendant Company and its then so-called officers for stockholders of the common assessable stock.

That on or about the 23rd day of June, 1945, the said Alma Kingsbury and Olga Marquardt, being then and there the holders of said "Class 'A' Non-assessable Common Stock", as aforesaid, caused this action to be instituted in this Court against the Independence Lead Mines Company, defendant, and the said defendant appeared through its President, F. C. Keane, in said cause and by answer alleged that the said issuance of said "Class 'A' Common Stock" and the holding thereof by the said plaintiffs, Alma Kingsbury and Olga Marquardt, was fraudulent and a fraud upon the holders of the common assessable stock of the said Company, and thereafter, without argument and without trial, the said F. C. Keane and certain of his co-attorneys in this action entered into a stipulation with the said plaintiffs by and through their attorney, H. J. Hull, of Wallace, Idaho, to settle the said controversy without argument or trial by allotting to the plaintiff, Alma Kingsbury, 400,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence [50] Lead Mines Company and by allotting to the said plaintiff, Olga Marquardt, 200,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence Lead Mines Company and by further allowing and awarding to said plaintiffs in said proportion 170,000 shares of stock of the Clayton Silver Mines Company and by further allowing

and awarding to said plaintiffs the sum of \$10,050.00 and causing judgment to be entered and rendered against the defendant Company, in accordance with the terms of said stipulation afore said; and this Court, on the 24th day of June, 1946, entered such judgment in accordance with said stipulation. The defendant Company, the Independence Lead Mines Company, now asserts that the said judgment is fraudulent and is a fraud upon this Court and this defendant Company, and makes this motion to set aside the same so this defendant can assert its lawful rights and defend and protect the rights of the holders of the common, assessable stock of this defendant Company; that no disclosure was made to this Court that the award of 170,000 shares of Clayton to the plaintiffs would deprive common assessable stockholders of a dividend previously declared, in the amount of 73,175 shares of Clayton which was a trust for said common stockholders held by the defendant Company and its so-called President, F. C. Keane."

Paragraph VII of said motion is amended to read as follows, to-wit:

VII.

"That F. C. Keane, acting as President of the defendant Company, the Independence Lead Mines Company, was in complete control thereof and had sold and disbursed all of the assets of said Company for his own use and benefit, as set forth in the complaint for Receivership, now pending in this Court in the case of L. J. Hopkins et al vs.

Independence Lead Mines Company et al, being Civil Cause No. 1687 to which reference is hereby made. And the said plaintiffs, well knowing that no [51] stockholders' meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by the said Keane was illegal and void.

Upon information and belief the said defendant alleges the following, to-wit: That the said plaintiffs, prior to, and during the litigation herein, have claimed to be by many times the largest stockholders of the Independence Lead Mines Company and during said time lived in the Town of Wallace, Idaho, and for a part of said time had maintained therein the principal brokerage office and brokerage business in Wallace, known as Pennaluna & Company, and during all times were in close touch with the said business and knew of the affairs of the said Independence Lead Mines Company and were fully aware that F. C. Keane was not in fact legally the president of the said Company and well knew that said Company had no legal Board of Directors and well knew that the said F. C. Keane was selling large blocks of the Clayton Silver Mining Company stock held by the said Independence Lead Mines Company in its treasury and was applying the proceeds thereof to his own use and was dissipating the same; and the

said plaintiffs claim to be such large stockholders of the Independence Lead Mines Company that they were in virtual control thereof; that the said plaintiffs failed and neglected to interfere in the affairs of the said Company (well knowing that the same was being bankrupted by the so-called president of the said Company) for the reason that they could secure and obtain a better settlement in connection with their own affairs and their ownership of the disputed Class "A" stock and the Clayton dividend that they claimed was due [52] thereon by dealing with the said so-called president who desired to conceal the true condition of the affairs of the said Company and his own misdeeds in connection with its operations; and that by reason of the above said plaintiffs were fully cognizant of all said matters for a long time prior to the settlement made in this case and the judgment entered therein.

Defendant also alleges that on or about July, 1945, or shortly thereafter, and prior to the making of the said settlement and the entry of the stipulated judgment, the said plaintiffs and their said attorney became alarmed at the large sales of stock of the Clayton Silver Mines Company belonging to the said Independence Lead Mines Company and notified, in writing, the said Clayton Silver Mines Company and its officers at its office in Wallace, Idaho, to stop forthwith all further transfers of Clayton stock belonging to the Independence Lead Mines Company and that if any further transfers of said stock were made on the books of the said Clayton Silver Mines Company they would

immediately bring injunction proceedings to prevent further disposition and transfer of said stock as aforesaid.

Upon information and belief, the said defendant alleges the following: That the doings and transactions of the said F. C. Keane in regard to dissipating the cash and funds of the Independence Lead Mines Company and selling the stock of the Clayton Silver Mines Company belonging to the Independence and squandering and dissipating the funds realized therefrom for his own benefit, and the extent of the possession by the Independence Lead Mines Company of the sum of only 170,000 shares of Clayton, including over 73,000 shares held in trust for common assessable stockholders, were well known in all particulars to the said plaintiffs long prior to the settlement made in this controversy and the judgment entered therein. [53]

That sometime prior to said settlement and compromise made in this action, one John Sekulic, being then and there a resident of the Town of Mullan, Idaho, promised and agreed with the said F. C. Keane that he could and would arrange a compromise and settlement of said controversy which the said F. C. Keane proposed to him (and by which proposal the said Keane instructed the said John Sekulic to propose to plaintiffs that Keane would pay over to them all of the stock of the Clayton Silver Mines Company remaining in the treasury of the Independence Lead Mines Company and also stock held as dividend previously declared by defendant and unsold by the said F. C.

Keane and amounting in all to 170,000 shares of said Clayton Silver Mines stock and for the sum of \$10,050.00 cash additional and also 600,000 shares of the Class "A" Common Stock, the legality of said Class "A" stock being then and there in dispute) providing the said F. C. Keane would pay to him, the said John Sekulic, the sum of \$10,000.00 cash as his fee and compensation for his said services immediately the said compromise and settlement was effected; and that further the said John Sekulic would inform the said plaintiffs that if they would not accept the said settlement they would receive nothing by any judgment secured against the Independence Lead Mines Company for the reason that said F. C. Keane would sell and dispose of all the remainder thereof and apply the funds to his own use and that he, the said John Sekulic, would further inform the said plaintiffs that the aforestated amount of stock of the Clayton Silver Mines Company was all of the stock remaining in the treasury, including stock that had been declared as a dividend but had not been paid out at the time to the common assessable stockholders and remained unclaimed as part thereof; that the said F. C. Keane agreed to pay to the said John Sekulic the sum of \$10,000.00 as his fees and compensation for his [54] services in the same; that said John Sekulic immediately after said agreement approached said plaintiffs, or one of them, and arranged and made a compromise and settlement with the said plaintiffs upon the terms agreed and as set out aforesaid, and when he in-

formed the said F. C. Keane that plaintiffs, in view of the circumstances heretofore related, would compromise their said claim, the said F. C. Keane caused a stipulation to that effect to be entered in the pleadings in this cause and a judgment to be entered by this court carrying out the terms of the said settlement; and the said F. C. Keane paid over or caused to be paid over to the said John Sekulic a sum of \$10,000.00 as his fees and compensation for his services therein.

That at the time said compromise and settlement was made by the said John Sekulic the said plaintiffs by reason of the foregoing had full and complete knowledge of all of the said affairs of the Independence Lead Mines Company and well knew that they were securing all of the Clayton stock left in the possession of the Independence Lead Mines Company and including many shares of stock which were being held in trust by the said Company for the use and benefit of certain stockholders other than the plaintiffs under a dividend declared to them by said Company in August and September, 1944.

That for a long period of time the said Independence Lead Mines Company, and more particularly its president, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the

Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington, and the rules and regulations of the Spokane Stock Exchange of Spokane, Washington; and the Secretary of the Securities and Exchange Commission threatened [55] to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as president of the Independence Lead Mines Company and by Glynn D. Evans as Secretary of the said Company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company; that an additional report for the year 1946 was not filed as aforesaid until on or about the 20th day of May, 1947.”

R. MAX ETTER

WILLIAM E. CULLEN

WALTER H. HANSON

Attorneys for Defendant.

(Duly verified.)

[Endorsed]: Filed Dec. 11, 1947. [56]

[Title of Court and Cause]

STIPULATION

Whereas on November 18, 1947 there was a hearing in the above entitled court on the plaintiffs' motion to dismiss the defendant's petition (so-called motion) for order setting aside judgment, with points and authorities and briefs submitted to the court at that hearing; and

Whereas at the conclusion of said hearing the court took the matter under advisement, allowed further briefs to be filed, and requested that further briefs be limited to the question of whether plaintiffs were chargeable by notice or law of fraud within defendant corporation; and

Whereas on December 6, 1947 plaintiffs' supplemental brief limited to the above question was filed, and on the same date defendant corporation served its amendment to its petition (so-called motion) to vacate; and

Whereas the defendant corporation has served and filed a motion for production of documents, and the plaintiffs have served and filed a motion to dismiss the amended petition (so-called motion) to vacate, a motion to strike portions of said amended petition and a motion, supported by affidavits, for more definite statement of portions of said amended petition; and

Whereas it has been informally agreed between the parties, with the informal approval of the court, that the November 18, 1947 hearing be

deemed a hearing on plaintiffs' motion to dismiss defendant corporation's amended petition (so-called motion) to vacate, with modification in the time allowed for filing briefs;

Now, therefore, it is hereby stipulated by the parties hereto as follows: [57]

1. That the November 18, 1947 hearing shall be deemed the hearing on plaintiffs' motion to dismiss the defendant corporation's amended petition (so-called motion) to vacate judgment;

2. Subject to approval of the court, plaintiffs may have until January 2, 1948 to serve and file their brief in support of said motion, the defendant corporation may have until January 23 to serve and file answering brief, and the plaintiffs may have until February 2, 1948 to serve and file their reply brief; and

3. The parties shall not notice for hearing the plaintiffs' motion to strike or the plaintiffs' motion for more definite statement or the defendant corporation's motion for production of documents until after the court has disposed of the plaintiffs' said motion to dismiss.

Dated this 15th day of December, 1947.

H. J. HULL,
Attorney for Plaintiffs.

R. MAX ETTER,
Attorney for Defendant
Corporation.

[Endorsed]: Filed Dec. 17, 1947. [58]

[Title of Court and Cause]

MOTION TO DISMISS DEFENDANT'S
AMENDED PETITION FOR ORDER
SETTING ASIDE JUDGMENT

The plaintiffs move the Court as follows:

1. To dismiss the defendant corporation's amended petition (so-called motion) for an order setting aside the judgment entered herein June 23, 1947, because said petition fails to state a claim against plaintiffs upon which relief can be granted.

Dated this 15th day of December, 1947.

H. J. HULL,
Attorney for Plaintiffs.

(Service acknowledged.)

[Endorsed]: Filed Dec. 17, 1947. [59]

[Title of Court and Cause]

ORDER

Plaintiffs in the above entitled cause having heretofore filed Motion to dismiss defendant's amended petition for order setting aside judgment. Motion to strike portions of defendant's Amended Petition for order setting aside judgment, and Motion for more definite statement, directed to defendant corporation's amended petition for order setting aside judgment.

The matter was presented to the Court and briefs later filed.

The Court have fully considered the motions and

other records and files in this cause, orders

That the motion to dismiss defendant's amended petition for order setting aside judgment, be and the same hereby is granted.

Dated this 9th day of February 1948

CHASE A. CLARK,
United States District Judge.

Note: The above ruling obviously makes it unnecessary to rule on Plaintiffs' other motions.

[Endorsed]: Filed Feb. 9, 1948. [60]

[Title of Court and Cause]

ORDER DISMISSING PETITION TO VACATE AND SET ASIDE JUDGMENT

June 23rd, 1947, the defendant filed herein its petition (or motion) to vacate and set aside the judgment entered herein June 24th, 1946, and to reopen this cause and allow defendant to file another answer and to reopen the cause for trial.

September 12th, 1947, the plaintiffs filed herein their motion to dismiss defendant's petition and the matter came regularly on to be heard at Coeur d'Alene, Idaho, November 18th, 1947, the plaintiffs being represented by their attorney, H. J. Hull, of Wallace, Idaho, and the defendant by its attor-

neys, W. H. Hanson, of Wallace, Idaho, and R. Max Etter and W. E. Cullen, Jr., of Spokane, Washington.

The matter was argued orally by counsel for the respective parties and time allowed for the filing of briefs, and on the 6th day of December, 1947, the defendant filed an amendment to its petition, or motion. December 15th, 1947, plaintiffs filed their motion to dismiss said petition as amended, whereupon counsel stipulated that the hearing of November 18th, 1947, might be deemed the hearing upon defendant's petition, or motion, as amended.

Briefs having been filed by plaintiffs and defendant, and the same having been read and considered by the court, and the court being fully advised in the premises, made and entered an order herein on the 9th day of February, 1948, granting plaintiffs' motion to dismiss the defendant's motion as amended.

The defendant having now advised the court that it desires to stand on its petition, or motion, as amended, and declines to plead further in the case.

Therefore, it is hereby ordered, and the court does hereby order, that the plaintiffs' motion to dismiss the defendant's [61] amended petition, or motion, to set aside the judgment, rendered and entered in this cause on the 24th day of June, 1946, and to reopen said cause, is hereby granted and the defendant's said amended petition, or motion, to set aside said judgment of June 24th, 1946,

and to reopen said case, is hereby dismissed, without leave to further amend.

Dated this 16th day of February, 1948.

CHASE A. CLARK,
United States District Judge.

(Entered in Civil Docket Book March 30, 1948.)

[Endorsed]: Filed March 30, 1948. [62]

In the District Court of the United States, District
of Idaho

Northern Division
No. 1687

L. J. HOPKINS and W. E. CULLEN,
Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,
an Arizona Corporation; F. C. KEANE and
GLYNN D. EVANS and WILLIAM MUL-
LEN, Directors of said corporation,
Defendants.

COMPLAINT

Come now the above named plaintiffs and complain of the above named defendants, and for cause of action allege:

I.

That said L. J. Hopkins and W. E. Cullen, are citizens of the United States and residents of the State of Washington, residing at Spokane, Wash-

ington; and the Independence Lead Mines Company is a corporation organized and existing under the laws of the State of Arizona, but doing business entirely within the State of Idaho where all its properties and its office for transacting business and its mines are located; and the said F. C. Keane, Glynn D. Evans and William Mullen are citizens and residents of the State of Idaho, living at Wallace, Shoshone County, Idaho; and said plaintiffs bring this action in behalf of themselves and all other stockholders of the Independence Lead Mines Company who care to join in the said action.

II.

That the Independence Lead Mines Company is a corporation organized under the laws of Arizona, with a capitalization of 3,000,000 shares of \$1.00 per share, assessable stock and 1,000,000 shares of "Class A" non-assessable stock of the par value of \$1.00 per share, doing business wholly in and owning property only in the State of Idaho.

That the mining property of said defendant, Independence Lead Mines Company, incorporated under the laws of Arizona, was originally known as the "Independence Lead Mines, Ltd.", an Idaho corporation, and the said "Independence Lead Mines, Ltd." was an Idaho corporation organized by the plaintiff, W. E. Cullen, in the year 1915 with a capitalization of 1,500,000 shares of the par value of \$1.00 per share.

III.

That the said plaintiff, W. E. Cullen, caused to

be transferred to the said "Independence Lead Mines, Ltd.", an Idaho corporation, the Independence-Gettysburg group of mining claims, situate, lying and being in the Hunters Creek Unorganized Mining District adjoining the Morning Mine of the Federal Mining and Smelting Company, in Shoshone County, Idaho, and at the time of the transfer he and his predecessors in interest had done a large amount of development work thereon, and after said transfer said plaintiff continued to do work thereon and was the owner of a large block of stock in said Company, and continues to have an interest in said present Company and is now a stockholder of record and has been at various times so a stockholder of record on the books of the Independence Lead Mines Company.

The said plaintiff, L. J. Hopkins, has been for a long time and now is a stockholder of record on the books of the Independence Lead Mines Company and was so a stockholder of record on the books of the Independence Lead Mines Company, an Arizona corporation, at the various times of the acts and deeds and transactions herein complained of, which said acts, deeds and transactions have been and are, continuous in their nature and effect upon the stock and the stockholders of the Independence Lead Mines Company, and affect the rights of all stockholders of said Company.

IV.

The said plaintiffs aver that the above named defendant, F. C. Keane, was elected, or appointed, a director several years [64] ago and for a long

time last past has been and is now, President of the Independence Lead Mines Company.

The said plaintiffs further aver that at the time of the election, or appointment, of the said F. C. Keane as a director of said Company the Board of Directors of said Company consisted of five (5) members and that on or about the end of the year 1941, death and resignation of all the other members of said Board left the said F. C. Keane the sole remaining member of the said Board of Directors.

That without any legal right or authority, and against the rights of the stockholders of the Independence Lead Mines Company, the said F. C. Keane then and there failed and refused to call a stockholders' meeting for the purpose of electing a legal Board of Directors of said Company, and without any right or authority, personally appointed William Mullen a member of said Board of Directors and made him Secretary of said Company; and thereafter appointed Glynn D. Evans a member of said Board of Directors, and said Mullen and said Evans are now conducting themselves as members of said Board of Directors without any authority from the stockholders of said Company and, in fact and in truth, said Company has no legal Board of Directors or officers, and has not had for many years past.

V.

That the Articles of Incorporation of the Independence Lead Mines Company provide that an annual meeting of the Company shall be held at

the office of the Company in Phoenix, Arizona on the 2nd Tuesday of January of each and every year, but despite the same, no meeting of the stockholders has been called or held since the said F. C. Keane became President of the said Company and for a period, to the plaintiffs unknown but which, on information and belief, plaintiffs allege to be for a period of at least eight (8) years last past and said F. C. Keane refuses to call any meeting of stockholders for the election of a new and legal Board of Directors of said Company [65]

VI.

That the By-Laws of the said Independence Lead Mines Company provide that no special meeting of stockholders shall be called or held for any purpose unless at least 50% of the stockholders of the Independence Lead Mines Company join in a written petition for such call.

VII.

That said plaintiff, W. E. Cullen, has used every effort to secure a special meeting of the stockholders of the Independence Lead Mines Company for the purpose of electing a new Board of Directors to take control of the management and affairs of the said Company, but on account of said provision in the By-Laws and the great amount of stock and stockholders, was and is unable to call said meeting and said plaintiffs herein must resort to this Court to secure their rights herein.

VIII.

That in various ways the Independence Lead Mines Company became the owner of 1,001,000

shares of stock in the Clayton Silver Mines Co., an Idaho Corporation, which said stock was set forth in the report of the Independence Lead Mines Company to the Standard Stock Exchange of Spokane, Washington, under date of December 31, 1942, as being of the value of \$872,200.00 and during said year covered by said report cash dividends were paid to the Independence Lead Mines Company on said holdings of the Clayton Silver Mines Co. stock in the amount of \$35,035.00 and after the payment of officers' salaries and expenses for said year a cash balance of \$27,305 was stated in said report to be in bank to the credit of the Independence Lead Mines Company.

IX.

The said defendant, F. C. Keane, during the said time set forth herein, has been receiving as President of said Company the sum of \$200.00 per month and William Mullen, as Secretary of the said Company since September 5, 1942, has been receiving the sum of \$150.00 per month for his services as such Secretary. [66]

X.

That on the 20th day of September, 1944, the Independence Lead Mines Company, through its Board of Directors, declared a dividend to the holders of the common assessable stock of the said Company in the Clayton Silver Mines Co. on the basis of one (1) share of stock in the Clayton Silver Mines Co. for each four (4) shares held and owned by the stockholders of the common assessable stock of the Independence Lead Mines Company, and further declared a cash dividend of the

cash on hand in like proportion to said stockholders.

XI.

Plaintiffs aver and allege that the stock of the Independence Lead Mines Company was listed on the Standard Stock Exchange of Spokane, Washington, which is now the Spokane Stock Exchange of Spokane, Washington, under the rules of the said Exchange and the rules of the Securities and Exchange Commission of the United States of America, and the same was and is traded in on said Exchange and has been so traded in for several years and since its said listing, and has many stockholders living and residing in many states of the United States of America.

XII.

Plaintiffs further aver that many stockholders of said Independence Lead Mines Company availed themselves of obtaining the shares of the Clayton Silver Mines Co. stock and the cash as dividends on their holdings of stock in said Company and the stock of the Independence Lead Mines Company thereupon was traded in upon the said Standard Stock Exchange, now the Spokane Stock Exchange, as "Independence Stock" for stock on which dividends had not been taken and as "Independence X" for stock on which said dividends had been taken by the stockholders and said stock was traded in on said Exchange in proportion to the value of Clayton Silver Mines Co. stock where the same had not been taken as a dividend by the stockholders and proportionately less where the

stock had been taken as a dividend, and is now being traded in extensively on said basis. [67]

XIII.

Plaintiffs aver that immediately upon declaration of the dividends so made as aforesaid, on the 20th day of September, 1944, the said stock of the Clayton Silver Mines Co. and the cash dividend became and was, and is, a trust fund, held by the Independence Lead Mines Company as a trust to be declared to the owners and holders of the stock on which such dividends had not been paid, and that there are many such stockholders who own such stock on which said dividends have not been paid.

XIV.

For a long period of time the said Independence Lead Mines Company, and more particularly its President, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington and the rules and regulations of the Spokane Stock Exchange of Spokane, Washington, and the Secretary of the Securities and Exchange Commission threatened to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock

Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit made by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as President of the Independence Lead Mines Company and by William Mullen, as Secretary of the said Company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company. [68]

XV.

The said audits and reports so made and filed as aforesaid disclosed that the said F. C. Keane, President of the Independence Lead Mines Company, had sold for his own use and benefit and for his own account, 218,000 shares of stock of the Clayton Silver Mines Co., being all the stock remaining in the possession of the Independence Lead Mining Company after the declaration of the said dividend and the withdrawal of the dividend by the various stockholders so withdrawing the same, and which constituted a trust fund as herein set out.

And the said reports further show that the said F. C. Keane had received for his own personal use and benefit the sum of \$152,257.00, no part of which was ever paid in to the treasury of the Independence Lead Mines Company, except the sum of \$34,750.00 paid by the said F. C. Keane in to the said Independence Lead Mines Company between January 1st and July 31st, 1946, leaving an

unpaid balance of \$117,597.00 due as of July 31, 1946.

The reports further show a bank balance of cash in banks of \$122.67 with heavy outstanding indebtedness.

XVI.

The said plaintiff, W. E. Cullen, and his predecessors in interest, had equipped the said Independence Lead Mines, Ltd. throughout a tunnel length of approximately a mile and a quarter with heavy ties and rails and with mine machinery of various kinds of considerable value which remained in said tunnel and on the grounds of the said Independence Lead Mines until the said F. C. Keane became President thereof and the said Plaintiff avers, on his information and belief, that the said F. C. Keane, for his own uses and purposes, has removed all of said rails, ties and machinery and transferred the same to the Lucky Friday Mining Company, or some other nearby operating company, for what consideration said plaintiff does not know, and without any right or authority so to do. [69]

And the said plaintiffs further allege that the said mining tunnel and underground works have been allowed to cave in and the buildings have been allowed to fall into a bad state of repair and the entire mining property of the said Independence Lead Mines Company has been neglected for a long period of time and has been, and is, practically abandoned and has received no care or attention for a great period of time.

XVII.

The said plaintiffs on their information and belief, allege the facts to be that the said F. C. Keane is the holder of record on the books of said corporation of a certificate of stock of 1,000 shares only and that, several years ago he sold and transferred the same, and the same is now owned by and in the possession of other parties than himself.

And the plaintiffs allege that, in any event, the said defendant, F. C. Keane, is the owner of a very small amount of stock of the Independence Lead Mines Company and has no interest in the said Company except to act as its President for a salary fixed by himself and for the purpose of securing the control and management and investment of the funds, mines and possession of said Independence Lead Mines Company; and that the said Independence Lead Mines Company is insolvent and unable to pay its bills and accounts and has been rendered insolvent by the acts and doings, for his own benefit, of the said F. C. Keane, acting as President of the said Company; when, in truth and in fact, he had no legal right of any kind to act as such Officer or Director or President.

Plaintiffs further allege that the Articles of Incorporation and By-Laws of the Independence Lead Mines Company provide for a Board of Directors of a minimum number of three directors to manage the affairs of said corporation and that ever since the first of January, 1942, said F. C. Keane had no directorship rights legally vested in him, except to call a stockholders' meeting to elect

a legal Board of Directors [70] on January 1st, 1942, and ever since said time the said defendant has constituted himself a Board of Directors of one member and every act and thing he has done since said time in the affairs of said corporation was, and is, void and fraudulent and not binding on said corporation, the Independence Lead Mines Company.

XVIII.

The said plaintiffs attach hereto, as part of this complaint, a statement of account marked "Exhibit A", taken from the report to the Spokane Stock Exchange for the year 1942 showing the receipt by said Independence Lead Mines Company of dividends from the Clayton Silver Mines Co. during said year amounting to \$35,035.00 and expenses of the said Board of Directors, including salaries paid, of a total of \$7,730.00, with a balance charged to surplus of \$27,305.00.

Also receipt of dividends in the year 1943 from the said Clayton Silver Mines Co. of \$30,030.00, with expenses of said officers and salaries amounting to the sum of \$10,885.43, leaving a balance accruing to earned surplus in the sum of \$19,144.57.

For the year 1944 dividends received from the said Clayton Silver Mines Co. of \$17,560.00 and expenses of the said F. C. Keane, including salaries, of \$13,163.41, leaving a net profit accruing to surplus of \$4,396.59.

XIX.

Plaintiffs allege that the Independence Lead Mines Company, as heretofore stated, is managed

and controlled entirely by F. C. Keane and state that, on their information and belief, a dividend of considerable amount is about to be paid to the Independence Lead Mines Company by the said Clayton Silver Mines Co. and will accrue to the benefit of the officers of the said Company and not to the benefit of the stockholders of the said Company; and the said plaintiffs allege that immediate and irreparable injury, loss and damage will result to the said [71] plaintiffs and the Independence Lead Mines Company unless a Receiver pendente lite is appointed herein before notice can be served on the defendants and a hearing on this application can be had.

XX.

The plaintiffs further allege that they are entitled to their costs and expenses, including reasonable attorneys' fees in the bringing of this action.

Wherefore these plaintiffs pray:

1. That a summons be issued requiring each and all of said defendants to appear in Court to answer the complaint of the plaintiffs on file herein.

2. That a Receiver pendente lite be appointed herein immediately and without notice, with full power to take possession of all the property of said defendant, the Independence Lead Mines Company, including its books of account, stock books, records, bank accounts, personal property of any and all kinds, and all the real property and mines

of the said defendant, the Independence Lead Mines Company; and that, after hearing duly had, the appointment of said Receiver be made permanent.

3. That the defendants and each and all of them be restrained and enjoined from interfering with the possession of the Receiver of such property and be ordered and directed to turn over to said Receiver all of the property, personal and real, of every kind belonging to said Independence Lead Mines Company.

4. That said plaintiffs be allowed their costs and expenses in this behalf expended, including reasonable attorneys' fees.

5. That the said plaintiffs have such further and additional relief herein as may be just and equitable.

R. MAX ETTER,

WILLIAM E. CULLEN,

Attorneys for Plaintiffs. [72]

State of Washington,
County of Spokane—ss.

W. E. Cullen, being duly sworn, deposes and says: That he is one of the foregoing plaintiffs; that he has read the foregoing complaint and knows the contents thereof and the same are true of his own knowledge, except as to those things stated

therein as being upon information and belief and as to those, he believes the same to be true.

W. E. CULLEN.

Subscribed and sworn to before me this 28 day of April, 1947.

(Seal)

JAMES P. DILLARD, JR.

Notary Public in and for the State of Washington, residing at Spokane. [73]

EXHIBIT "A"

Accounts shown by reports of the Independence Lead Mines Company on file with the Spokane Stock Exchange, Spokane, Washington.

YEAR 1942

Dividend of Clayton Silver Mines Co.....		\$35,035.00
Salaries.....	\$3,423.50	
Interest.....	258.78	
Filing and Registration.....	25.50	
Insurance.....	174.75	
Legal and Accounting.....	757.60	
Postage.....	30.06	
Supplies.....	72.81	
Taxes.....	1,991.57	
Telephone.....	61.53	
Travel.....	933.90	
	<hr/>	
Total Expenses		7,730.00
		<hr/>
Balance to Surplus.....		\$27,305.00

YEAR 1943

Dividend of Clayton Silver Mines.....		\$30,030.00
Officers' Salaries.....	\$4,200.00	
Travel.....	2,157.62	
Accounting and Auditing.....	700.00	
Geology and Engineering.....	900.00	
Surface Repairs.....	430.13	
Office Supplies.....	162.83	

Year 1943—(Continued)

Insurance.....	135.40	
Light and Power.....	158.90	
Telephone.....	60.65	
Interest.....	55.34	
Misc.....	322.30	
Income Tax.....	\$817.03	
Capital Stock.....	138.75	
State & County Tax.....	163.15	
Social Security-Emp. Tax.....	483.33	1,602.26
Total expense		10,885.43
To Earned Surplus.....		\$19,144.57

EARNED SURPLUS

Bal. Jan. 1, 1943 (deficit).....	\$217,989.25
Prior surplus adj.	247.05
	\$217,742.20
Bal. Dec. 31, 1943 (deficit).....	\$198,597.63

YEAR 1944

Dividends of Clayton Silver Mines Co.....	\$17,560.00
Officers' Salaries.....	\$ 4,200.00
Travel.....	771.72
Accounting and Auditing.....	700.00
Geology & Engineering.....	1,231.90
Surface Repairs.....	22.00
Office Supplies and Expense.....	209.40
Insurance.....	12.00
Light and Power.....	84.88
Telephone.....	56.76
Taxes.....	5,871.70
Total Expense	13,163.41
Net Profit	\$ 4,396.59

Sale price 80,000 shares of Clayton Silver Mines Co.	\$40,961.00
Book value of above.....	69,703.00
Loss on sale.....	28,747.00
Net Loss	\$24,350.41

Earned Surplus bal. Dec. 31, 1943 (deficit)....\$198,597.63
 Earned Surplus bal. Dec. 31, 1944 (deficit).... 222,948.04

YEAR 1945

Sales 138,000 shares Clayton Silver Mines Co.	\$ 71,760.18	
Book value of 138,000 shs. Clayton Silver Mines Co.	120,246.30	
	<hr/>	
Sales Loss		\$ 48,486.12
Officers' Salaries.....	\$ 3,700.00	
Travel.....	57.61	
Accounting and Auditing.....	25.00	
Legal.....	1,141.68	
Geology.....	250.00	
Insurance.....	183.25	
Light and Power.....	134.93	
Telephone.....	60.15	
Interest.....	220.85	
Misc.....	371.07	
Income Tax.....	\$10,227.91	
State.....	1,697.35	
Soc. Security.....	197.77	
Rev. Stamps.....	249.18	
Property Tax.....	239.79	
Corp. License.....	58.00	12,680.00
	<hr/>	<hr/>
Total Expense		18,829.54
		<hr/>
Net Loss For Year.....		\$67,315.66

“Supplementing my examination of the Independence Lead Mines Company on Form 10-K for the years 1944 and 1945.

I inadvertently omitted a qualification pertaining to the following transactions relative to the disposal through sale of 218,000 shares of Clayton Silver Mines stock.

It should be pointed out the company had not recorded sales transactions of the 218,000 shares of the Clayton Silver Mines stock sold during the year 1944 and 1945. At the outset of the examination I was verbally informed by F. C. Keane, President of the Independence Lead Mines Company,

that the stock had been sold through his personal account and was given the names of J. T. Halin, Arthur Schelde, and Frank Lilly of Spokane, Washington, as the purchasers of the stock through private transactions. In order to confirm these sales I corresponded directly with the purchasers of the Clayton Silver Mines stock and addressed a letter to each purchaser.

I received direct communication from J. T. Halin and Arthur Schelde of Spokane, Washington, accounting for 185,000 shares of Clayton Silver Mines stock giving detail as to date and amount of each check paid to either F. C. Keane or the Montana Leasing Company at a total sales price of \$94,723.10 (51.2c per share), and from Frank Lilly of Spokane, Washington, for 40,000 shares at a total sales price of \$22,000 (55c per share). In addition, Mr. Keane informed me that 4,000 shares were sold on the name of O. Rairdon for approximately 51.2c per share of \$2,048.08 although no verification was secured on this transaction.

F. C. Keane reacquired 11,000 shares which were issued as dividends to common stock of the Independence Lead Mines.

Since the above transactions were never recorded on the records of the Independence Lead Mines Company and since it was impossible to reconcile the amounts received from sale of stock with deposits made on the bank statements, I thought it necessary in order to account for the disposition of the stock to make an entry, charging the Montana Leasing Co., based on information contained

in the confirmations, for the entire sales price with offsetting credit for the 11,000 shares reacquired at 55c per share, which according to the confirmation was the highest price at which the stock was sold. This resulted in a net charge of \$112,721.18 for 218,000 shares.

Proper accounting procedure would have required that all receipts from the sale of stock be deposited in the bank account of the Independence Lead Mines Co., and disbursements issued therefrom. The method in which these transactions were handled, therefore, would not conform to generally accepted accounting principles.

L. J. RANDALL, C. P. A.

Box 738, Scott Building

Wallace, Idaho

[Endorsed]: Filed April 28, 1947. [76]

[Title of Court and Cause]

SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

To: Independence Lead Mines Company, an Arizona Corporation; F. C. Keane and Glynn D. Evans and William Mullen, Directors of said Corporation.

From the verified complaint herein, good and sufficient reasons appearing that plaintiffs will suffer immediate and irreparable injury, loss or damage, and it otherwise appearing necessary and proper, therefor,

It is hereby ordered that
the defendants named and each of them shall ap-

pear before me at my courtroom in the Federal Post Office Building, Coeur d'Alene, Idaho, at the hour of 2 P. M. on the 2nd day of May 1947, then and there to show cause why a receiver should not be appointed to take possession of all the property of said defendant, the Independence Lead Mines Company, including its books of account, stock books, records, bank accounts, personal property of any and all kinds, and all the real property and mines of the said defendant, the Independence Lead Mines Company.

And the defendants and each of them are hereby restrained pending hearing on this order from disposing of any assets of the said defendant, the Independence Lead Mines Company, and from paying over personally or to the interest or the account of any of said defendants any funds, stock or other assets whatsoever of the said defendant, the Independence Lead Mines Company.

Dated this 28th day of April, 1947.

CHASE A. CLARK,

Judge of the District Court of the United States,
for the District of Idaho, Northern Division.

[Endorsed]: Filed April 28, 1947. [77]

[Title of Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the Independence Lead Mines Company, a corporation, defendant in the above-entitled action, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit

from the final order entered in this action. Such order was entered, after and following argument in this action, on the 16th day of February, 1948, by order entitled "Order Dismissing Petition to Vacate and Set Aside Judgment".

/s/ R. MAX ETTER,
/s/ WILLIAM E. CULLEN,
ls! WALTER H. HANSON,
Attorneys for Defendant.

[Endorsed]: Filed May 12, 1948. [78]

[Title of Court and Cause]

COST BOND ON APPEAL

Know all men by these presents:

That the undersigned, Independence Lead Mines Company, an Arizona corporation, the defendant in the above-entitled action, as Principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, authorized to transact the business of surety in the State of Idaho, as Surety, are held and firmly bound unto the above-entitled Alma R. Kingsbury and Olga Marquardt in the full and just sum of Two Hundred Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principal and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of May, 1948.

Whereas, lately on the 16th day of February, 1948, at the fall term of the District Court of the

United States, in and for the District of Idaho, Northern Division, in a suit *depending* in said court between Alma R. Kingsbury and Olga Marquardt, plaintiffs, and Independence Lead Mines Company, defendant, a final order was rendered against the said Independence Lead Mines Company, and the said Independence Lead Mines Company has duly filed Notice of Appeal from said final order, entitled "Order Dismissing Petition to Vacate and Set Aside Judgment",

Now, therefore, the condition of the above obligation is such that if the said Independence Lead Mines Company shall prosecute said appeal to effect, and answer all costs, not exceeding Two Hundred Fifty Dollars, if it fails to make good [79] its plea, then the above obligation to be void, else to remain in full force and virtue.

(Seal)

INDEPENDENCE LEAD
MINES COMPANY

By W. E. Cullen,
President

By F. W. Kiesling,
Secretary

(Seal)

UNITED STATES FIDELITY
AND GUARANTY
COMPANY

By J. T. Paradise,
Attorney-in-fact

Countersigned at Sandpoint, Idaho.

FARMIN INSURANCE
AGENCY

By Robt. Coons

(Attached)

GENERAL POWER OF ATTORNEY

No. 57257

Know all Men by these Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint J. T. Paradise of the City of Spokane, State of Washington its true and lawful attorney for the following purposes, to-wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said J. T. Paradise may lawfully do in the premises by virtue of these presents. [80]

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-Presi-

dent and Assistant Secretary, this 15th day of September, A. D. 1941.

(Seal) UNITED STATES FIDELITY
AND GUARANTY
COMPANY.

By /s/ E. W. Levering, Jr.
Vice-President.

/s/ J. E. Gittings
Assistant Secretary.

State of Maryland,
Baltimore City—ss:

On this 15th day of September, A. D. 1941, before me personally came E. W. Levering, Jr., Vice-President of the United States Fidelity and Guaranty Company and J. E. Gittings, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said E. W. Levering, Jr. and J. E. Gittings were respectively the Vice-President and the Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order

as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A.D. 1943.

(Seal) /s/ FRIEDA WALTER,
Notary Public.

State of Maryland,
Baltimore City—ss.

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do [81] hereby certify that Frieda Walter, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 15th day of September, A. D. 1941.

(Seal) /s/ M. LUTHER PITTMAN,
Clerk of the Superior Court of Baltimore City.

COPY OF RESOLUTION

That Whereas, it is necessary for the effectual transaction of business that this Company appoint

agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, [82] or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required

or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Harry Prevost, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to J. T. Paradise of Spokane, Washington, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and [83] correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my

hand and the seal of the United States Fidelity and Guaranty Company, this 11th day of February, 1948.

HARRY PREVOST,
Assistant Secretary.

[Endorsed]: Filed May 12, 1948. [84]

[Title of Court and Cause]

DESIGNATION OF RECORD AND PROCEED-
INGS TO BE INCLUDED IN RECORD
ON APPEAL

Comes now the Independence Lead Mines Company, a corporation, defendant in the above-entitled action, and hereby designates the complete record and proceedings in the above-entitled cause to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, Cause No. 1603-N, filed in this court June 23, 1945.

2. Answer of Independence Lead Mines Company, a corporation, defendant, filed in this court April 29, 1946, in the case of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, Cause No. 1603-N.

3. Amendment to Complaint, filed in this court

by plaintiffs on May 22, 1946, in Cause No. 1603-N.

4. Stipulation filed in this court June 29, 1946, in Cause No. 1603-N.

5. Judgment and Decree filed in this court June 29, 1946, in Cause No. 1603-N.

6. Motion of Defendant, Independence Lead Mines Company, to Vacate and Set Aside Judgment and Reopen Said Cause to Allow Independence Lead Mines Company to File a Proper Answer and to Reopen Said Cause for Trial, filed in this court June 23, 1947, in Cause No. 1603-N.

7. Notice of Association of Walter H. Hanson of Wallace, Idaho, as Associate Counsel, filed by defendant in this court August 25, 1947, in Cause No. 1603-N.

8. Motion of Plaintiffs, Alma Kingsbury and Olga Marquardt, to Dismiss Defendant's Petition for Order Setting Aside Judgment, filed in this court on or about September 12, 1947, in Cause No. 1603-N.

9. Motion of Plaintiffs, Alma Kingsbury and Olga Marquardt, to strike Portions of Defendant's Petition for Order Setting Aside Judgment, filed in this court on or about September 12, 1947, in Cause No. 1603-N. [85]

10. Defendant's Notice to plaintiffs to bring on Motion for Production of Documents, filed in this court on September 24, 1947, in Cause No. 1603-N.

11. Defendant's Motion for Production of Docu-

ments and Affidavit of W. E. Cullen in support of motion, designated as Exhibit "A" in said motion, and filed in this court on September 22, 1947, in Cause No. 1603-N.

12. Plaintiffs' Motion to Quash Notice of Motion, and Affidavit of H. J. Hull in support thereof, filed in this court in Cause No. 1603-N.

13. Certificate to Accompany Motion for Production of Documents, filed by Defendant in this court on September 27, 1947, in Cause No. 1603-N.

14. Affidavit of Mailing Notice and Motion, filed by the Defendant in this court on September 24, 1947, in Cause No. 1603-N.

15. Defendant's Amendment to Motion to Vacate and Set Aside Judgment and Reopen said Cause to Allow Independence Lead Mines Company to File a Proper Answer and to Reopen said Cause for Trial, filed in this court on or about December 15, 1947, in Cause No. 1603-N.

16. Stipulation of Plaintiffs and Defendant, filed in this court in Cause No. 1603-N.

17. Plaintiffs' Motion to Dismiss Defendant's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

18. Plaintiffs' Motion to Strike Portions of Defendant's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

19. Motion of Plaintiffs for More Definite

Statement, Directed to Defendant Corporation's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

20. Affidavit of H. J. Hull, dated December 13, 1947, and filed in this court in Cause No. 1603-N.

21. Affidavit of Alma Kingsbury, dated December 13, 1947, and filed in this court in Cause No. 1603-N.

22. Order of the court, dated February 9, 1948, and filed in this court February 9, 1948, in Cause No. 1603-N.

23. Order Dismissing Petition to Vacate and Set Aside Judgment, dated February 16, 1948, and filed in this court in Cause No. 1603-N. [86]

24. Complaint, and Exhibits attached, in the case of L. J. Hopkins and W. E. Cullen, Plaintiffs, vs. Independence Lead Mines Company, an Arizona Corporation and F. C. Keane and Glynn D. Evans and William Mullen, Directors of said corporation, Defendants, Case No. 1687, filed in this court on April 28, 1947.

25. Show Cause and Temporary Restraining Order in Cause No. 1687, filed in this court, signed by the court and dated April 28, 1947.

26. Order of the court, Case No. 1687, filed in this court on November 17, 1947.

The Clerk of the above-entitled court is hereby directed to prepare, certify and transmit to said

Circuit Court of Appeals the above-designated record on appeal.

Dated this 11th day of May, 1948.

R. MAX ETTER
WILLIAM E. CULLEN
WALTER H. HANSON
Attorneys for Defendant.

(Affidavit of Mailing attached.)

[Endorsed]: Filed May 12, 1948. [87]

[Title of Court and Cause]

APPELLEES' DESIGNATION OF RECORD

Alma R. Kingsbury and Olga Marquardt, appellees in the above entitled cause, designate the following for inclusion in the record on appeal:

Plaintiffs' Motion for Default, filed April 29, 1946.

Affidavit of H. J. Hull, supporting motion for default, filed April 29, 1946.

Defendant's Notice of Appeal, filed May 12, 1948.

Defendant's Designation of Record and Proceedings to be Included on Record on Appeal, dated May 11, 1948, and filed on or about May 12, 1948.

This Designation of the contents of the record on appeal.

H. J. HULL,
J. K. CHEADLE.

(Service Acknowledged.)

[Endorsed]: Filed May 24, 1948. [88]

[Title of Court and Cause]

STIPULATION RE RECORD ON APPEAL

Pursuant to Rule 75(h) of RCP, it appearing that by inadvertent error, or accident, certain items were omitted from previous designations of record on appeal in the above cause; and pursuant to Rule 75(f); and in order that the record be abbreviated in accordance with Rule 75(e).

It is stipulated between the parties to the above entitled cause that there be included in the record on appeal to be certified and transmitted by the clerk of the district court the following, and only the following items:

1. Complaint of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, filed June 23, 1945.

2. Motion to dismiss complaint, filed *July 25, 1945, 1945.*

3. Order denying motion to dismiss, entered and filed December 30, 1945.

4. Plaintiffs' motion for default, served April 27, 1946, and filed April 29, 1946.

5. Affidavit of H. J. Hull supporting motion for default, served April 27, 1946, and filed April 29, 1946.

6. Answer of Independence Lead Mines Company, a corporation, defendant, served and filed April 29, 1946.

7. Amendment to complaint, filed May 22, 1946.

8. Stipulation, filed June 29, 1946.

9. Judgment and decree, filed June 29, 1946.

10. Motion of defendant, Independence Lead Mines Company, to vacate and set aside judgment and reopen said cause to allow Independence Lead Mines Company to file a proper answer and to reopen said cause for trial, filed June 23, 1947.

11. Motion of plaintiffs, Alma Kingsbury and Olga Marquardt, to dismiss defendant's petition for order setting aside judgment, filed on or about September 12, 1947. [89]

12. Defendant's amendment to motion to vacate and set aside judgment and reopen said cause to allow Independence Lead Mines Company to file a proper answer and to reopen said cause for trial, served December 6, 1947 and filed on or about December 12, 1947.

13. Stipulation of plaintiffs and defendant, dated December 15, 1947 and filed on or about December 16, 1947.

14. Plaintiffs' motion to dismiss defendant's amended petition for order setting aside judgment, dated December 15, 1947, and filed on or about December 16, 1947.

15. Order of the court, dated February 9, 1948, and entered and filed in this court February 9, 1948.

16. Order dismissing petition to vacate and set aside judgment, dated February 16, 1948, entered and filed in this court on or about March 30, 1948.

17. Complaint, and exhibits attached, in the case

of L. J. Hopkins and W. E. Cullen, plaintiffs, vs. Independence Lead Mines Company, an Arizona corporation, and F. C. Keane and Glynn D. Evans and William Mullen, directors of said corporation, defendants, Case No. 1687, filed in this court on April 28, 1947.

18. Show cause and temporary restraining order in Cause No. 1687, filed in this court, signed by the court and dated April 28, 1947.

19. Defendant's notice of appeal, filed May 12, 1948.

20. Defendant's bond for costs on appeal, filed May 12, 1948.

21. Defendant's designation of record and proceedings to be included on record on appeal, dated May 11, 1948, and filed on or about May 12, 1948.

22. Plaintiffs' designation of the contents of the record on appeal, served May 21, 1948, and filed May 24, 1948.

23. This stipulation re record on appeal.

It is further stipulated between said parties that this stipulation as to the record and proceedings to be included in the record on appeal shall be followed by the clerk of the district court instead of the designations heretofore served and filed by the parties.

It is further stipulated between said parties that inclusion in this stipulation of the items above designated as Nos. [90] 17 and 18 shall be without prejudice in any way to a motion, by appellees, to strike said items from the record or to objection

by appellees to consideration of said items by the appellate court; and that this stipulation shall not constitute a waiver nor prejudice in any way any motion by appellees to dismiss the appeal for any reason.

Dated: June 4, 1948.

R. MAX ETTER,

By WEC

WILLIAM E. CULLEN,

.....

H. J. HULL,

J. K. CHEADLE,

Attorneys for Appellees, Alma R. Kingsbury and
Olga Marquardt.

[Endorsed]: Filed June 11, 1948. [91]

[Title of Court and Cause]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 91 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the

Ninth Circuit, in accord with designations of contents of record on appeal of the appellant and appellees, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$36.40, and that the same have been paid in full by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of June, 1948.

(Seal)

ED. M. BRYAN,
Clerk.

[Endorsed]: No. 11959. United States Circuit Court of Appeals for the Ninth Circuit. Independence Lead Mines Company, a corporation, Appellant, vs. Alma R. Kingsbury and Olga Marquardt, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Filed June 21, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,
Ninth Circuit

No. 11959

INDEPENDENCE LEAD MINES COMPANY,
an Arizona corporation,

Appellant,

vs.

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Appellees.

REQUEST FOR PRINTING OF RECORD AND
STATEMENT OF POINTS

I.

Appellant deems necessary on this appeal, to a proper understanding of the questions involved, the consideration by the Court of the entire record certified to this Court by the Clerk of the District Court in accordance with Stipulation re Record on Appeal entered into between appellant and appellees on June 4, 1948, and including this request for printing of record and statement of points, and hereby requests that the same be printed, excepting and omitting formal parts of pleadings and other court papers.

II.

Appellant hereby designates for consideration on this appeal the following points on which it intends to rely:

(1) The appellant's motion to vacate and set aside judgment and reopen said cause to allow

Independence Lead Mines Company to file a proper answer and to reopen said cause for trial may and should be treated by the Court as a proper petition or complaint in an action based upon the fraudulent participation by the appellees in procuring the judgment originally entered against the appellant and against which judgment the appellant now seeks relief. The formal designation of appellant's so-called motion is immaterial if in fact the allegations therein allege fraud in the procurement of the original judgment. [1]

(2) The allegations of the amended motion or petition sufficiently allege facts, which, if true, show such connivance and fraudulent participation on the part of the appellees in procuring the judgment which would justify setting aside that judgment heretofore obtained by them against the appellant, and the petition because of such factual showing is not vulnerable to a motion to dismiss.

(3) The amended motion or petition shows and sufficiently alleges that the appellees had full and complete knowledge prior to the entry of the judgment herein against the appellant and in favor of the appellees that none of the officers of the appellant were either legally constituted officers of the appellant or defacto officers and the appellees knew that the then so-called president of the appellant, who was also the attorney for the appellant, had appropriated stock belonging to the appellant to his own use, and they knew when they entered into the stipulated judgment with the appellant through its so-called president and attorney for all

of the remaining stock held by the appellant and sought by them that only that certain definite amount of stock taken by them in said judgment remained in the treasury of the appellant; and the appellees knew that such stock was imposed with a trust character for all of the stockholders of the appellant who were holders of common assessable stock in the appellant corporation, and they knew that no payment of said stock had ever been authorized to them or any other stockholders of the appellant who owned so-called Class "A" non-assessable stock.

(4) The appellees knew the exact condition of the appellant corporation and they knew of the defalcations and misappropriations of the so-called president and its attorney a long time prior to the entry of any stipulated judgment between them and the appellant, and the appellees knew and had first-hand knowledge of the misappropriations from the appellant by its so-called [2] president because they had been approached by an agent of the so-called president of the appellant, who informed them of said facts concerning the appellant corporation and who proposed to them prior to the entry of judgment the settlement that could be made.

(5) The appellees knew for a long time that none of the directors of the appellant corporation with whom they were dealing were legally constituted directors and they knew that said directors were not defacto directors and they knew that said direc-

tors held no stock in the appellant corporation and therefore could not act as directors and they knew that said directors of the appellant corporation could not bind and obligate the company.

(6) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts in such petition clearly alleged participation by the appellees in fraud in the procurement of the judgment against the appellant.

(7) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly shows that the so-called officers and directors of the appellant had no capacity to bind the appellant, which the appellees well knew, and because the appellees had means of knowledge and actual notice of all of the affairs of the appellant and were charged by such notice with dealing with the appellant's so-called president and officers at their peril.

(8) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly alleges such knowledge by the appellees of the appellant corporation's affairs that there was a duty on their part to refrain from acting or collaborating or participating with the appellant's so-called president or directors and because there had been [3] sufficient notice to them that said directors were not

legal directors or defacto directors or entitled in any way to act for the appellant corporation.

(9) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts alleged in the petition conclusively show the existence of extrinsic fraud in the procurement of the judgment and in the participation of the procurement of said judgment by the appellees, and the amended motion or petition further clearly shows and alleges that the appellees did participate in the fraudulent procurement of the judgment and thereby participated in the fraud upon the appellant and upon the court.

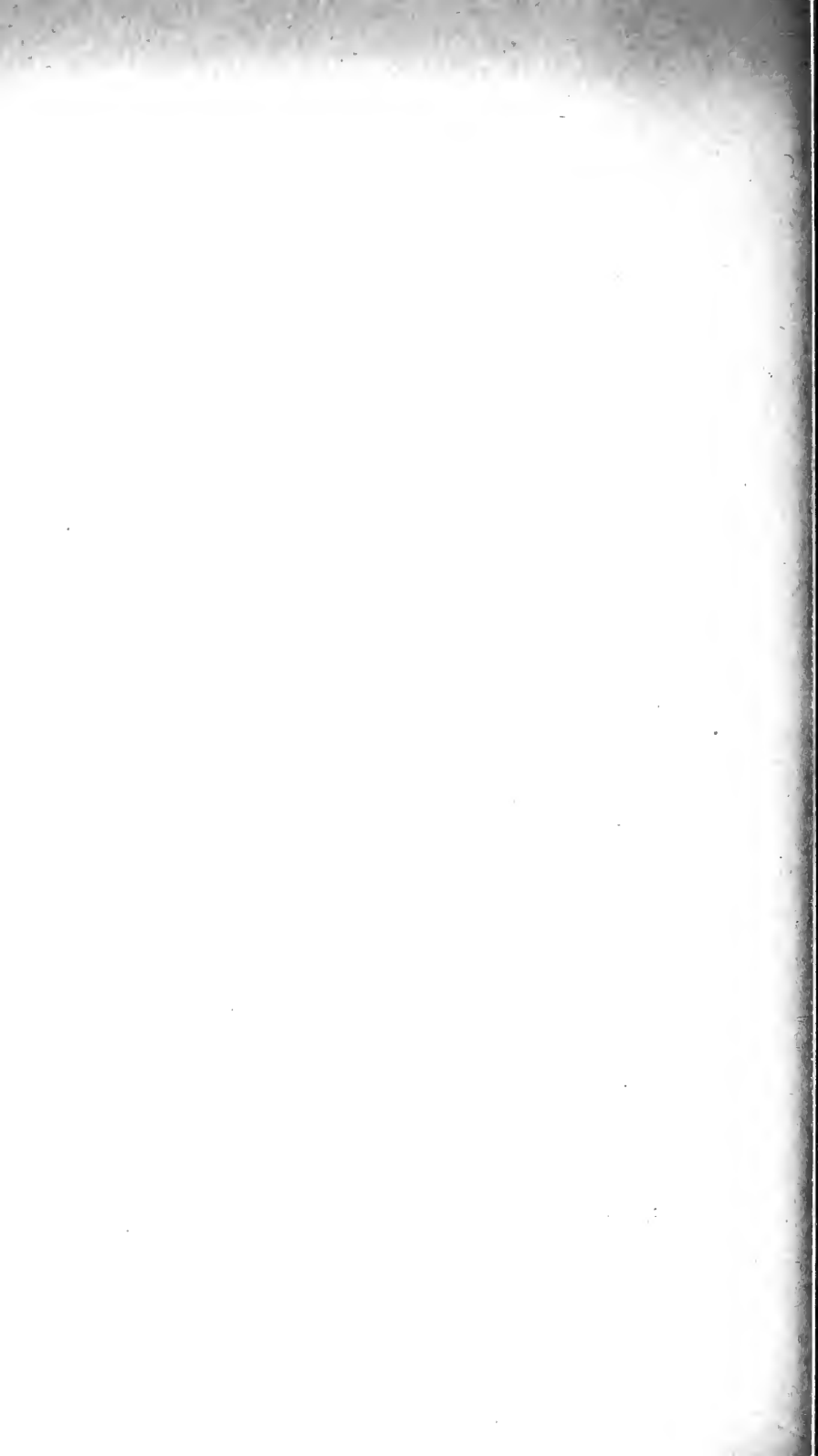
/s/ R. MAX ETTER,
!s/ WILLIAM E. CULLEN,
/s/ WALTER H. HANSON,
By C.,

Attorneys for Appellant.

Service of the foregoing Request for Printing of Record and Statement of Points, by receipt of a copy thereof, is hereby accepted this 6th day of July, 1948.

/s/ H. J. HULL,
/s/ J. K. CHEADLE,
Attorneys for Appellees.

[Endorsed]: Filed July 8, 1948. [4]



No. 11959

United States

Circuit Court of Appeals

For the Ninth Circuit

INDEPENDENCE LEAD MINES COM-
PANY, an Arizona Corporation,

Appellant,

v.

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Appellees.

Appellant's Opening Brief

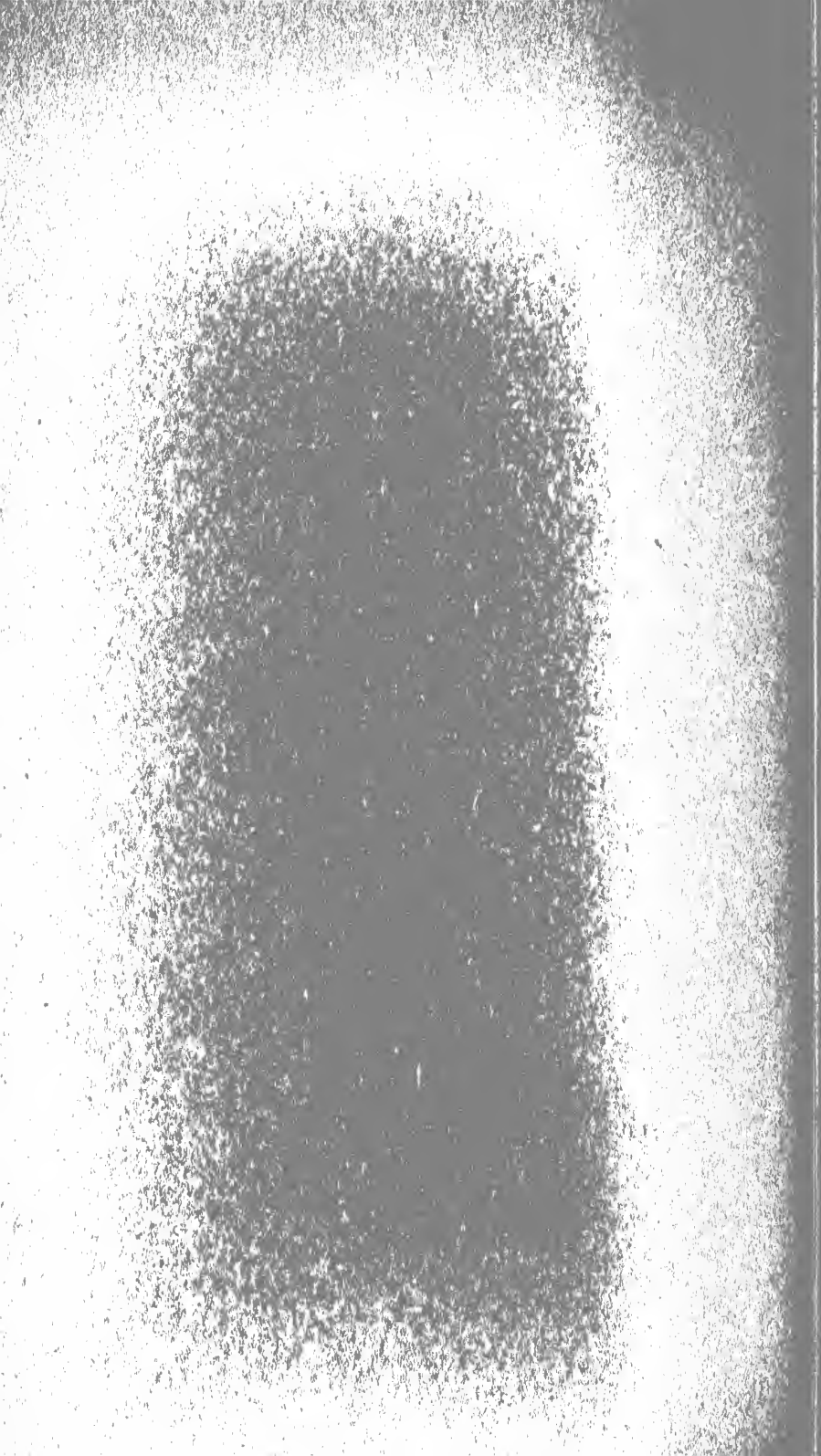
*Upon Appeal from the District Court of the United
States for the District of Idaho,
Northern Division*

FILED

SEP 7 - 1948

R. MAX ETTER,
WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.



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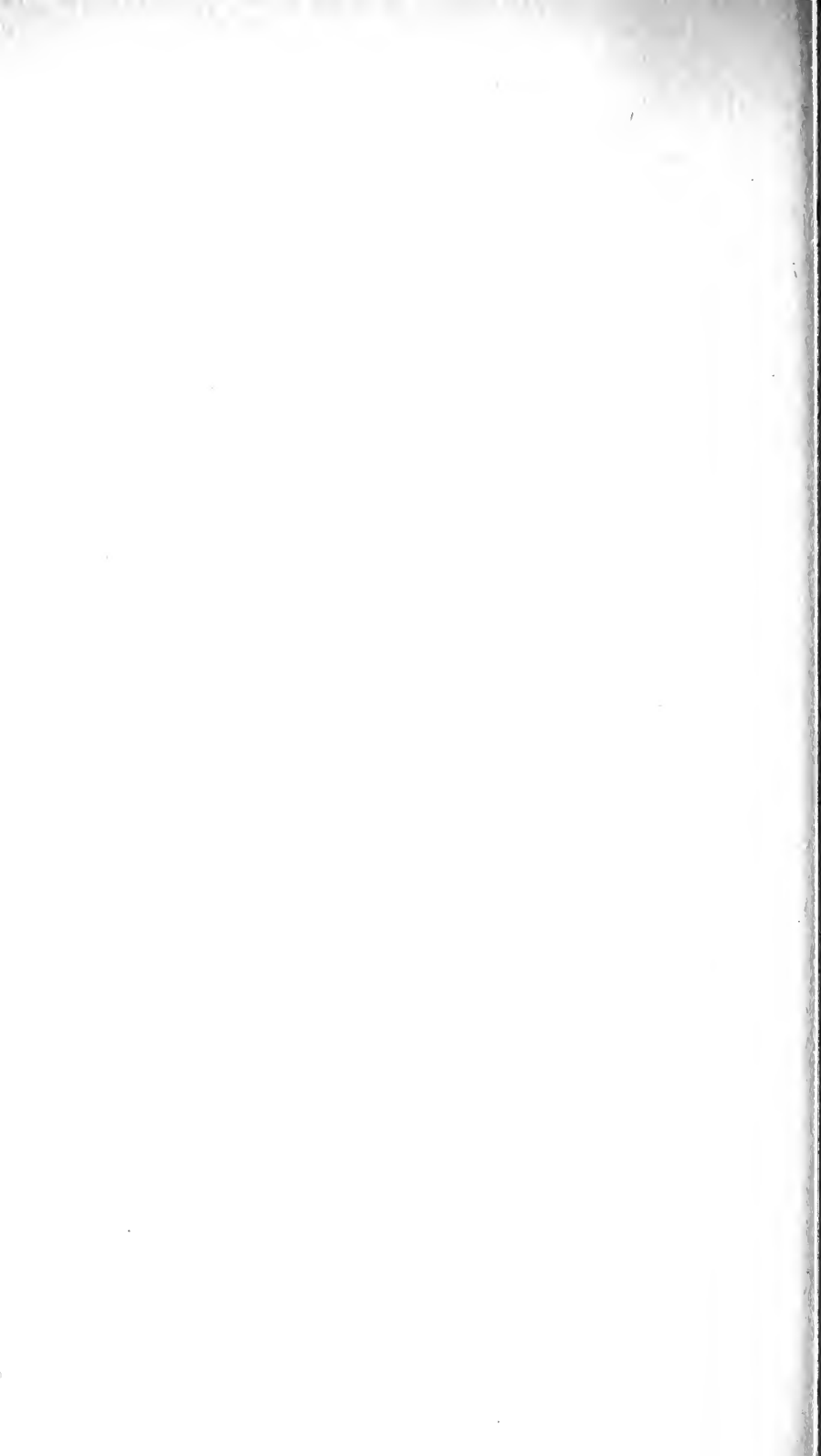
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No. 11959

United States

Circuit Court of Appeals

For the Ninth Circuit

INDEPENDENCE LEAD MINES COM-
PANY, an Arizona Corporation,

Appellant,

v.

ALMA R. KINGSBURY and
OLGA MARQUARDT,

Appellees.

Appellant's Opening Brief

*Upon Appeal from the District Court of the United
States for the District of Idaho,
Northern Division*

R. MAX ETTER,
WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.
WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.

JURISDICTION

This action was originally brought by the plaintiffs, Alma R. Kingsbury and Olga Marquardt, who are citizens and residents of the State of Idaho, against the defendant, Independence Lead Mines Company, a corporation, and a citizen and resident of the State of Arizona. The action was brought to compel the defendant to distribute and deliver to the plaintiffs certain shares of the stock of Clayton Silver Mines, Inc., to which plaintiffs claimed they were entitled by reason of their ownership of certain stock, designated as "common stock Class A" in the defendant corporation, and which they claimed entitled them to the pro-rata distribution of a stock dividend of Clayton Stock declared by the defendant. Plaintiffs asked an alternative money judgment in excess of \$3,000.00 (tr. 9).

The controversy was therefore a controversy which at the time of the commencement of the action was, and still is, entirely between citizens of entirely different states, and the amount in controversy is, and was at the time of the commencement of the action in excess of the sum of \$3,000.00.

The jurisdiction of the District Court existed under Section 41, Title 28, U. S. C. A., Judicial Code, Section 24 amended. The appeal to this Court is from an order granting the motion to dismiss of the appellees, dated the 9th day of February, 1948 (tr. 79, 80), and from a final order dismissing petition to vacate and set

aside judgment, dated the 16th day of February, 1948, and entered March 30, 1948. Notice of appeal was filed in the office of the Clerk of the District Court on the 12th day of May, 1948, and jurisdiction is believed to exist under Section 225, Title 28, U. S. C. A., being Judicial Code, Section 128 as amended.

STATEMENT OF THE CASE

This is an action based upon a petition of the appellant, Independence Lead Mines Company, to vacate and set aside a judgment heretofore entered against the appellant corporation and in favor of the appellees, Alma R. Kingsbury and Olga Marquardt. Judgment sought to be reopened was signed on the 24th day of June, 1946, and filed June 29, 1946.

Plaintiffs, Alma R. Kingsbury and Olga Marquardt (being appellees in this cause) brought an action in the District Court of the United States for the District of Idaho, Northern Division, against the defendant (appellant herein) setting forth that appellant's original authorized capital stock was divided into 4,000,000 shares of a par value of \$1.00 per share and that such stock was divided into two kinds of stock, there being 3,000,000 shares designated as "common" stock and 1,000,000 shares designated as "preferred" stock; that the preferred stock was non-assessable and had certain preferences otherwise. Complaint stated that on February 10, 1932, the stockholders, by resolution duly adopted at a stockholders' meeting, amended the Articles of Incorporation of the appellant and eliminated the preferred stock, authorizing in lieu of said stock 1,000,000 shares of so-called common stock Class A and providing that such stock should be non-assessable; that the appellant corporation for value received issued to the Mines Finance Corporation, an Idaho corporation, upon the amendment, the 1,000,000 shares of common stock Class A and that on the 31st

day of December, 1941, the Mines Finance Corporation assigned and transferred 666,667 shares of the common stock Class A to appellee, Alma R. Kingsbury, and 333,333 shares to one Herman Marquardt, now deceased, husband of appellee, Olga Marquardt; that thereafter the appellant corporation issued 666,667 shares of said common stock Class A to Alma R. Kingsbury, and after probate of the said estate of Herman Marquardt, Olga Marquardt, appellee, received 333,333 shares of the common stock Class A. The appellees in their original action set out that the appellant, Independence Lead Mines Company, acquired 1,001,000 shares of the Clayton Silver Mines, Inc., an Arizona corporation, and that said Independence Lead Mines Company authorized the distribution on September 1, 1944, of most of this Clayton stock to the shareholders of the Independence Lead Mines Company on the basis of one share of Clayton to each four shares of the Independence Lead Mines stock owned by the various stockholders; that the Independence Lead Mines Company, appellant here, refused to distribute any of the Clayton stock to the appellees who claimed that their common stock Class A was entitled to enjoy all of the rights, privileges and benefits of the other common stock of the Independence Lead Mines Company (tr. 4, 5, 6, 7, 8). Appellant, Independence Lead Mines Company, filed motion to dismiss in the District Court on July 25, 1945, and the same was denied on November 30, 1945 (tr. 34, 35), and appellant filed its answer on April 29, 1946, in which answer the appellant denied that 1,000,000 shares

of common stock Class A were ever lawfully issued. Appellant further denied that there was any consideration of any nature whatsoever for any of the transfers alleged by appellees to them of the common stock Class A. The appellant corporation in its answer contended that the transfers of the common stock Class A to the appellees constituted a fraud on the corporation (tr. 38, 39, 40, 41, 42). Appellees amended their complaint and filed said amended complaint on May 22, 1946 (tr. 43, 44, 45). They asked that in the event the appellant was unable to deliver the proper ratio of stock that it be compelled to make the plaintiffs whole by payment to them of stocks and cash. On the 22nd day of June, 1946, appellant and appellees, through counsel, entered into a stipulation (tr. 45, 46, 47), which stipulation was incorporated in a judgment and decree entered the 24th day of June, 1946 (tr. 48, 49, 50), whereby appellees were to surrender 400,000 shares of the common stock Class A of the appellant corporation and were to have and to receive in return 170,000 shares of the Clayton Silver Mines stock and \$10,050.00 in cash. The judgment also decreed that appellee, Alma R. Kingsbury, was the bona fide owner of 400,000 shares of the common stock Class A of the appellant corporation, and that appellee, Olga Marquardt, was the bona fide owner of 200,000 shares of the common stock Class A of the appellant, Independence Lead Mines Company, and that all of said stock has, possesses and is entitled to the same identical rights, privileges and benefits as the common stock of the appellant, Independence Lead Mines Company. The order

decreed that the only difference between the common stock and the common stock Class A was that the latter was not subject to assessment (tr. 49, 50).

On June 23, 1947, appellant corporation, Independence Lead Mines Company, filed its motion to vacate and set aside judgment (tr. 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64), hereafter referred to as the petition, and on December 11, 1947, filed its amendment to motion to vacate and set aside judgment and reopen said cause to allow Independence Lead Mines Company to file a proper answer and to reopen said cause for trial, which will hereafter be referred to as the amended petition (see amended petition of appellant in appendix, *infra* p. 34).

The amended petition set forth that at the time of the amendment of the appellant Independence Lead Mines Company's Articles of Incorporation to create the common stock Class A designation, that representations were made by the Independence Lead Mines Company's president and secretary to all of its stockholders that said stock would be held in the treasury of the company and would only be exchanged for the purchase of other mining properties; that no mining properties were purchased pursuant to the representations made to the stockholders; that Henry B. Kingsbury and Herman Marquardt in about the year 1923 were the president and secretary of the Independence Lead Mines, Ltd., the predecessor in interest to the appellant, Independence Lead Mines Company, and that they formed the Mines Finance Corporation, of

which Henry B. Kingsbury became president and Herman Marquardt became secretary and of which company they were the sole stockholders (tr. 51, 52, 53). The amended petition alleged that the purpose of the Mines Finance Corporation was to take and receive the funds of the Independence Lead Mines, Ltd., which were secured by the levying of assessments on the common stock of the latter company; that the Mines Finance Corporation had no source of revenue or income. The amended petition set forth that thirteen assessments were levied upon the appellant company for the benefit of the Mines Finance Corporation and Henry B. Kingsbury and Herman Marquardt; that during or shortly after the year 1930 the said Kingsbury and Marquardt controlled absolutely the appellant corporation here and the Mines Finance Corporation and that they secured to themselves the 1,000,000 shares of common stock Class A of the appellant, Independence Lead Mines Company, fraudulently and without any consideration; that by reason of the deaths of Henry B. Kingsbury and Herman Marquardt, the present appellees, who are the widows of said deceased persons, came into the possession and alleged ownership of the 1,000,000 shares of common stock Class A of the Independence Lead Mines Company; that Henry B. Kingsbury and Herman Marquardt had defrauded the company and all of its stockholders by making no distinction in the certificates of the Independence Lead Mines Company of the classes of the stock, and that they had, by keeping permanent control of the appellant corporation, caused the fraudulent issue of the

common stock Class A to be made (tr. 54, 55, 56, 57, 58). The amended petition alleged that since the death of Herman Marquardt in August of 1942, the appellant corporation had been controlled and dominated by one F. C. Keane of Wallace, Idaho, who acted as president without any right or authority, as he had not been a stockholder since some time in the year 1940, and that the said Keane had appointed two other directors who likewise had no right or authority to act as such; that this Board of Directors in August of 1944 had caused a resolution to be passed providing for the payment of Clayton stock as dividends to the holders of Independence Lead Mines Company stock, on a one to four ratio, and specifically declaring in the resolution that the Class A common stock should not participate because of a question as to its validity (tr. 66, 67, 68); that said F. C. Keane, who was in complete control of the appellant corporation, had sold and disposed of almost all of the assets of the company for his own use and benefit, as had been set forth in a complaint for receivership (tr. 82), which complaint also alleged that said Keane had misappropriated the property of the appellant corporation and had withheld information required by the regulations of the Securities and Exchange Commission for a number of years while he was engaging in his misappropriations. The amended petition also alleged that the appellees have been for some time by far the largest stockholders of the appellant corporation and that they lived in the Town of Wallace, Idaho, where said company maintained its principal office, and that they also maintained and

operated the largest brokerage business in Wallace, known as Pennaluna and Company, and that they knew of the affairs of the appellant corporation and that they knew that the company had no legal Board of Directors and that they knew that F. C. Keane was applying the proceeds of the sale of Independence Lead Mines Company assets to his own use and was dissipating the same. It was also alleged that the appellees were such large stockholders of the appellant corporation that they were in virtual control and that they would not interfere with the said F. C. Keane because they knew they could get a good settlement in the cause of action instituted by them if they did not do so; that in July of 1945 the appellees here and their attorney, in writing notified the Clayton Silver Mines, Inc., to stop any further transfers of Clayton stock belonging to Independence Lead Mines Company, and that the appellees threatened an injunction action, and that they knew about the dissipation of the appellant's funds prior to bringing their action in the District Court against the appellant, and did nothing about it (tr. 71, 72). The amended petition also alleged that knowledge of the misappropriation by the said F. C. Keane of the funds of the Independence Lead Mines Company was known by the appellees prior to any settlement and that the said F. C. Keane had sent one John Sekulic, an emissary of his, to the appellees to propose to them a settlement and to show them, the appellees, that they had better take a settlement of all of the remaining stock of the Clayton Silver Mines, Inc., owned by the Independence Lead Mines Company, to-wit,

170,000 shares; that the said emissary Sekulic was paid \$10,000.00 to arrange this settlement, and that after said negotiations between Keane, Sekulic and the appellees, the stipulated judgment heretofore referred to was entered (tr. 73, 74, 75, 76). The amended petition alleged that Sekulic informed appellees that they had better accept his offer or take nothing, and that appellees were fully advised as to Keane's activities but settled with him even though the validity of their common stock Class A was in dispute.

Motion to dismiss was filed by appellees on the 15th day of December, 1947 (tr. 79). Orders of dismissal were entered, pursuant to argument, by the District Court (tr. 79, 80, 81, 82). The principal question that the District Court had to decide was whether or not there was fraud participated in by the appellees, in view of their knowledge of the appellant corporation's affairs, their relationship to the appellant corporation, and their activities and dealings with the appellant corporation and its so-called president and Board of Directors, in the entry of the stipulated judgment against the appellant, Independence Lead Mines Company.

SPECIFICATIONS OF ERROR

(1) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts in such petition clearly alleged participation by the appellees in fraud in the procurement of the judgment against the appellant.

(2) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly shows that the so-called officers and directors of the appellant had no capacity to bind the appellant, which the appellees well knew, and because the appellees had means of knowledge and actual notice of all of the affairs of the appellant and were charged by such notice that they were dealing with the appellant's so-called president and officers at their peril.

(3) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly alleges such knowledge by the appellees of the appellant corporation's affairs that there was a duty on their part to refrain from acting or collaborating or participating with the appellant's so-called president or directors, and because there had been sufficient notice to them that said directors were not legal directors or defacto di-

rectors or entitled in any way to act for the appellant corporation.

(4) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts alleged in the petition conclusively show the existence of extrinsic fraud in the procurement of the judgment and in the participation of the procurement of said judgment by the appellees, and the amended motion or petition further clearly shows and alleges that the appellees did participate in the fraudulent procurement of the judgment and thereby participated in the fraud upon the appellant and upon the court.

SUMMARY OF ARGUMENT

The facts alleged in the amended petition will be considered as admitted in view of the appellees' motion to dismiss. The amended petition of the appellant seeking to reopen a judgment and decree heretofore entered by stipulation between appellees and appellant on the 24th day of June, 1946, alleges extrinsic fraud and a connivance, collusion and participation in such fraud by the appellees. The amended petition likewise sets up an adequate defense to appellees' alleged cause of action set forth in their original complaint against the appellant which sought a distribution of appellant's dividend stock (tr. 2-10). It is not material whether the amended petition be designated a motion or a petition. It can be treated as an independent action in the nature of a bill of review.

The amended petition clearly shows the existence of extrinsic fraud and the participation by the appellees in the same. The appellees did not stand in relation to the appellant corporation as an ordinary small or minority stockholder. In addition to the above, they were by far the largest single stockholders in the appellant corporation and they had intimate knowledge of the affairs of the appellant corporation because of their relationship to the individuals who controlled the corporation, to-wit, their husbands. They likewise were familiar with the affairs of the appellant because they were both active in the management of a brokerage firm which was the largest in the vicinity where the appellant had its principal offices and mining prop-

erties and which afforded them an intimate knowledge of mining corporation activities. The appellees were duty bound to refrain from acting or collaborating with the president of the appellant corporation and the appellant corporation, in view of the fact that they had complete knowledge of the defalcations in the affairs of the appellant, and they knew that in the settlement in which they participated with the president of the appellant, they were taking all of the Clayton stock held by the appellant for distribution as dividends, to the exclusion of all the other stockholders of the appellant corporation who legally were entitled to a pro rata distribution of the dividend stock. The appellees were duty bound not to deal with the president of the appellant because they had actual knowledge that the president was not legally authorized to act on behalf of the appellant, and they therefore knew that they were dealing with such a person. The appellees knew that the president had misappropriated great amounts of the Clayton stock which was held by the appellant as a trust to be distributed by the appellant to its common stockholders, and they were advised that the 170,000 shares of Clayton Silver Mines stock which they accepted from the appellant in the stipulated judgment was all that the appellant corporation had left to distribute to all of its holders of common stock. The appellees knew that no assessments had ever been paid on their common stock Class A and that the common stockholders who had paid assessments for many years to finance the appellant corporation could not receive any dividend if they, the appellees, received all the

dividend stock. The appellees did not deal, in view of their intimate knowledge of the affairs of the appellant and their actual knowledge of the illegality of any action of its president or Board of Directors, with its president or Board of Directors as stockholders or third parties dealing with defacto directors. The appellees knew that the president of the appellant corporation and the directors were not defacto or dejure officers of the appellant and they knew of this fact and they had likewise been advised through an emissary of the defalcating president of the appellant corporation that the only proposition that the president of the appellant would make to them to settle their claims in view of the condition he himself had unlawfully created with appellant corporation's affairs, was the offer finally incorporated in the stipulated judgment. The appellees made their settlement with the appellant corporation not by any compromise arising from a debatable determination of the validity of their claim but because they knew of the unlawful acts of the president and could secure all of the Clayton Silver Mines stock held by appellant if they took no further action against the president of the appellant or the appellant itself.

ARGUMENT

I.

THE AMENDED PETITION

The amended petition set out in full in the appendix (see page 34, *infra*) alleges the facts upon which the appellant seeks to reopen the judgment of the court heretofore entered on the 24th day of June, 1946 (tr. 48, 49, 50). The facts in the amended petition comply with the necessary requisites of an independent action in the nature of a bill of review. The amended petition not only sets forth allegations of extrinsic fraud in the procurement of the judgment heretofore referred to, and the connivance, collusion and participation in the fraud by the appellees, but it likewise sets up a meritorious and adequate defense to the alleged cause of action originally brought by the appellees against the appellant corporation in which they secured the entry of a stipulated judgment. Regardless of the designation of the pleading seeking to reopen the judgment, the court can treat the same as an independent action in the nature of a bill of review.

Oliver vs. City of Shattuck, 157 F. (2d) 150, 152 (CCA 10th 1946).

In the above case, at page 153, the court states:

“* * * without pains to label the form of the action or the remedy * * *”

Also see:

Norris vs. Camp, 144 F. (2d) 1, 4 (CCA 10th 1944);

Fiske, et al vs. Buder, 125 F. (2d) 841 (discussion of Rule 60B).

II.

ERRORS WITH RESPECT TO THE ORDER OF THE COURT

GRANTING APPELLEES' MOTION TO DISMISS (1-4)

It may be suggested that the errors assigned in the ruling of the court on the appellant's petition to reopen have been condensed in the principal question which was before the District Court for decision (see page 11, *supra*). The consideration of the errors will therefore be combined in a chronological argument.

The amended petition alleges participation by the appellees in fraud in the procurement of the stipulated judgment (tr. 50-64, incl., tr. 65-76, incl., appendix page 34). The allegations heretofore referred to in the record as being included in the whole amended petition specifically show that the fraud complained of here is of extrinsic character. The entire amended petition itself is a narration of such fraud that it is a hypertechnical problem to segregate just exactly what might be considered as fraud of other than an extrinsic nature. The rule applicable here is set out in *Cyclopedia, Federal Procedure*, Vol. 8, Page 386 et seq.:

“Any wilful misrepresentation inducing the court to render an improper and unjust decree or to include improper provisions may be made the basis of such an application, as where the court is induced by misrepresentations of fact to sign the particular decree.

“One of the most troublesome distinctions in the law, almost as celebrated as that between ‘latent’ and ‘patent’ ambiguities in applying the parol evidence rule, is that between ‘extrinsic’ and ‘intrinsic’ fraud as ground for equitable relief from a judgment. That understanding of jurisprudence, which the legal profession at least should have, would have been furthered by discarding such expressions long ago; but they seem to have some unfortunate and perpetuating allure.

“Sometimes it has been sought to fasten the distinction upon the difference between fraud upon the court and other fraud; but this requires at least a broad view of what constitutes fraud ‘upon the court’ as the conduct or deceit which commonly forms the basis for relief is directed at the opposite party, deceiving him, rather than the court. *Probably no universally satisfactory test can be laid down.*” (Emphasis supplied.)

Likewise in *Hanna vs. Bricton Manufacturing Company*, 62 Fed. (2d) at Page 139:

“Without drawing nice distinctions between extrinsic and intrinsic fraud, a decree will be set aside for fraud which clearly prevented the making of a full and fair defense.”

It is an accepted maxim that every court has inherent power which is not dependent upon any statute,

to control or vacate its own decrees when the interests of justice so require.

The appellees herein participated in fraud and connived, within the definition of the term, with the alleged president of the appellant corporation and its alleged board of directors (tr. 65-76, incl., appendix page 34) and none of the transactions by which appellees secured common stock Class A or transactions prior thereto concerning said stock, engaged in between predecessors in interest of the appellees and the appellant corporation, were known to the appellant's new and legal board of directors until about the 26th day of May, 1947 (tr. 62, 75, 76, appendix pages 53, 51, 52), Webster defines connivance in law as being:

“corrupt or guilty assent to wrongdoing not involving *actual* participation in it, *but knowledge of and failure to prevent or oppose it . . . a passive consent or cooperation.*” (Underscoring supplied.)

In this connection the appellant submits that where any person wilfully abstains from any attempt to prevent misconduct which he knows is occurring and is further likely to occur, then he should be held to have connived in such misconduct within the meaning of the definition. This must be surely so where such a person knowingly profits as a result of wrongdoing known to him. It would not be necessary that appellees instigated the fraud, although it appears that instigation is a fairly descriptive term if the entire transactions set forth in the amended petition between the

appellant corporation, the predecessors in interest of the appellees, and the appellees are considered.

The situation presented here is not a situation that concerns minority stockholders dealing with the appellant corporation nor does it concern a majority stockholder dealing with a corporation at arm's length. The situation presented here is a course of dealing between the appellant corporation and the appellees where the appellees because of their relationship to the corporation had actual knowledge of the corporation's affairs, and also had, because of their large stock ownership and active interest and dealings with the appellant, an actual domination of the corporation (tr. 71, 72, appendix pages 47, 48, 49).

In *Fletcher Cyclopedia Corporations*, Permanent Edition, Vol. 13, Section 5811 at Page 127, we find:

“A stockholder, even though he owns a majority of the stock, does not occupy a trust relation towards the other stockholders merely because of his holding of such stock, and it has been vigorously asserted that majority stockholders are in no case trustees for the minority. But while, in a narrow and restricted sense, it cannot be said that the holder or holders of the majority of the stock occupy a relation of trust, yet it can be said, in a larger and broader sense, that they sustain a fiduciary relation to the holders of the minority stock and the corporation. *And according to most of the decisions, a trust or fiduciary relation arises under certain circumstances. The actual control of the property “is the basis in all of the cases of the trust relation.”* Thus it is held that when a number of stockholders combine to constitute them-

selves a majority in order to control the corporation as they see fit, *they become for all practical purposes the corporation itself*, and assume the trust relation occupied by the corporation towards its stockholders. It has been held that if a majority stockholder actually dominates the company, although not himself an officer, through his control of a majority of the board of directors, he stands in the same fiduciary relation to the other stockholders as he would sustain if he were a director or other officer. Of course, if a majority stockholder is also a director and the president or other chief officer of the corporation, he is a trustee." (Emphasis supplied.)

Levy vs. American Beverage Corp., 265 App. Div. 208, 38 N. Y. S. (2d) 517;

Dodge vs. Scripps, 179 Wash. 308, 37 P. (2d) 896, 900;

In re Los Angeles Lumber Products Co., 46 F. Supp. 77.

Majority stockholders are obliged to act in good faith as far as the rights of the minority stockholders are concerned.

"Majority stockholders, to the extent to which they control the corporation, must act in good faith, as far as the rights of minority stockholders are concerned. Their transactions must be free from fraud, and must not amount to a wanton destruction of the rights of the minority. It is a breach of duty to manipulate the business of the company in their own interests to the injury of minority stockholders. However, there is no duty on the part of majority stockholders to assist the corporation financially in its money difficulties and thereby shield it from financial destruction."

(*Fletcher Cyclopaedia Corporations*, Permanent Edition, Vol. 13, Sec. 5810.)

Dodge vs. Scripps, 179 Wash. 308, 37 P. (2d) 896, 900;

Morse vs. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219, 221, 222;

In re Kansas City Journal Post Co., 51 F. Supp. 1009.

Likewise, a majority of stockholders cannot help themselves to all of the corporate assets to the absolute exclusion of minority stockholders. (See Sec. 5785, *Fletcher Cyclopaedia Corporations*, Permanent Edition, Vol. 13, which says:

“Majority stockholders have no power to distribute or divide corporate assets among themselves, to the exclusion of minority stockholders. If they do so, minority stockholders may, in a proper case, obtain relief by a suit in equity. However, owners of all the stock may dedicate the corporate property to their private use, where there are no creditors or third persons who may object.”)

Heimbaugh vs. Hitchcock, 115 Kansas 182, 222 Pac. 114.

In the case cited above, the majority owner of the preferred stock of a corporation, through his control of the corporation, manipulated a stock transaction which increased the valuation of his stock and decreased the valuation of the common stock held by the plaintiff. The court held that he could not increase the value of

the preferred stock held by him, at the expense of the plaintiff. The situation presented here is analogous to that under consideration by the court in the case cited (tr. 51-58, incl., appendix pages 35-42 incl). The appellees and their predecessors in interest were and became for all practical purposes the appellant corporation itself. In the present instance, of course, the manipulations alleged in the amended petition increased tremendously the value of the holdings of the predecessors of the appellees, at the expense of all of the other stockholders of the appellant corporation who had paid assessments for many years. Many of appellant's common stockholders were eventually deprived of receiving any dividends from the corporation in the form of distribution of Clayton Silver Mines stock held by it because of the actions of the appellees in taking all of such dividend stock held by the appellant, upon their claim, and subsequent acquiescence in an uncontested stipulated judgment that the non-assessable stock which they held was entitled to such a distribution. These benefits inured to the appellees by their participation and connivance in the stipulated judgment to which they were parties with knowledge of the illegality of the acts of the appellant's directors and defalcating so-called president of the appellant corporation. Appellees were parties to fraud because they knew of the defalcations of the president, had been advised of the defalcations, and had taken active steps with such knowledge to insure a subsequent settlement to them of all the appellant's dividend Clayton Silver Mines stock. Likewise the position of the appellees as

majority stockholders and their knowledge gained from close association with the corporation and with mining activities in general (tr. 71, 72, appendix pages 47-49 incl.) placed them in a position where their participation and collusion in the stipulated judgment constituted a breach of trust and was a fraud upon the corporation, the minority stockholders and the court. (See Sec. 5829, pages 161 to 166, and Sec. 5834, pages 173, 174, 175, *Fletcher Cyclopedia Corporations*, Permanent Edition, Vol. 13, appendix pages 56, 57, 58.)

The appellees had knowledge that the actions of the president of the corporation and the board of directors were illegal, and participated in collusion and connivance with the alleged president when they were parties to the stipulated judgment against the appellant corporation (tr. 71, appendix page 47). It is no defense to the actions of the appellees to assert that they were dealing at least with defacto officers of the corporation. In view of the allegations of the amended petition (tr. 71 et seq., appendix page 47), the appellees knew they were not dealing with defacto or de jure officers of the appellant.

The present officers of the corporation may sue in equity to vacate the judgment heretofore entered against the corporation because of the collusion between the alleged president and board of directors of the appellant corporation and the appellees at the time of the entry of the stipulated judgment. In. Sec. 5831, *Fletcher Cyclopedia Corporations*, Permanent Edition, Vol. 13, at page 169, it is provided as follows:

“A suit will lie in equity to vacate a judgment obtained by collusion with corporate officers, or the stockholder may intervene in proper cases to open it or to prevent its entry by interposing a defense on behalf of the corporation.”

A case directly in point, *Whitney vs. Hazzard*, 18 S. D. 490, 101 N. W. 346, is cited in the annotation to the above section. In that case the plaintiff and some thirty other individuals who claimed to be stockholders in a gold mining corporation brought an action against the defendant, Hazzard, and the gold mining company to vacate and set aside a decree of foreclosure entered in favor of Hazzard and against the corporation. The complaint alleged that in 1893 one Day, the president of the gold mining corporation, procured a loan from Hazzard through various agents to apply on payment of mining property in California which had been purchased by Day in his own name and for which Day gave his promissory notes to the persons named. To secure the notes Day and one Lewis, secretary of the company, executed to the parties notes and a mortgage in the name of the gold mining company, which notes and mortgage were assigned to Hazzard. In 1896, Day's note not being paid, an action was commenced by Hazzard and a decree of foreclosure was entered. The property of the mining company was sold thereon and bid in by Hazzard and the sale was subsequently confirmed. In 1900 the plaintiffs, having learned of facts concerning the fraudulent use of the mortgage by the said defendant, moved to vacate and set aside the decree. Hazzard appeared and filed an affidavit alleging that the mortgage was properly and

legally executed and he induced the court to deny the plaintiffs' motion by means of other false and fraudulent statements. However, in 1902 the plaintiffs came into possession of documents and all of the facts relating to the transaction which could show that they, Day and Hazzard, acted together, and that the decree against the gold mining company was obtained by collusion between Hazzard and Day. In stating the law applicable to this case, the court cited the Supreme Court of the United States in *United States vs. Throckmorton*, 98 U. S. 61, 25 L. Ed. 31. The court said as follows:

“In that case the court, after discussing the general rule, says: “There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent—as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff * * * these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. (Citing cases.) In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree that party has been prevented from presenting all his case to the court * * *”

Likewise, the court continues further as follows:

“Mr. Wells, in his very useful work on *Res Adjudicata*, says (section 499): ‘Fraud vitiates everything, and a judgment equally with a contract—that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. * * * Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant in presenting the defense in the legal action.’” It appears from the complaint in the case at bar that there was no real contest on the trial or hearing of the case, and for this reason a new suit would be sustained to set aside or annul the former judgment or decree and open the case for a new and fair hearing.” (*Whitney vs. Hazard*, 101 N. W. Reporter, at page 347.)

Also see:

Manahan vs. Petroleum Producing & Refining Company, 198 App. Div. 192, 189 N. Y. S. 127.

The amended petition (see appendix pages 49, 50, 51) indicates that the appellees knew from the offer made to them by John Sekulic (tr. 73, 74, 75) that they would by stipulating a judgment take all of the Clayton Silver Mines dividend stock, and they knew or they should have known from their relationship with their predecessors in interest, and their own subsequent activities with appellant corporation and others, that their so-called Class A common stock was issued without con-

sideration (tr. 54, 55, 56, 57, 58, appendix pages 38-42 incl.). In knowing what appellees actually knew about F. C. Keane's illegal position in assuming to act as president of the appellant corporation, they actually participated in a fraud upon the defendant corporation. It is interesting to note that immediately prior to the entry of the stipulated judgment and decree against the appellant corporation (tr. 48, 49, 50) an amendment to the prayer of appellees' complaint was filed (tr. 44, 45), which was as follows:

“That the defendant, Independence Lead Mines Company be ordered and directed to forthwith distribute and deliver to these plaintiffs 250,000 shares of the capital stock of the Clayton Silver Mines, Inc., and account to the plaintiff, and pay to them, the sum of Three Thousand (\$3,000.00) Dollars, being the dividend declared and paid thereon as herein alleged.

“In the event defendant is unable to deliver said 250,000 shares of Clayton stock to the plaintiffs in full, that then said judgment or decree order and direct the defendant to make the plaintiffs whole with respect to so many shares of said stock as the defendant is unable to deliver to the plaintiffs by payment to plaintiffs of such sum as the Court shall determine meet and equitable, or by such other means as the Court shall determine.”

It would thus appear that appellees knew of the situation in the appellant corporation and that they deliberately took from the corporation by their stipulated judgment all of the Clayton Silver Mines stock which then was held by the appellant and which had

become a trust for the benefit of the common stockholders of the appellant corporation by a resolution previously entered (tr. 67, 68). It seems well settled that a trust fund was in fact created for the benefit of the stockholders at the time of the declaration of dividends to the common stockholders from the Clayton Silver Mines stock held by the appellant corporation. See *In Re Interborough Consolidated Corporation*, 288 Fed. Reporter 334-349. Likewise, at 14 *Corpus Juris*, Page 816, Section 1238, we find the following:

“But where a corporation has not only declared a dividend but has specifically appropriated and set apart from its other assets a fund out of which the dividend is to be paid, such action constitutes the assets so set apart a trust fund in the hands of the corporation for the payment of the stockholders to the exclusion of other creditors.”

It seems pertinent to inquire why the appellees and the appellant corporation, through its alleged president at the time of the stipulation, settled for 170,000 shares of Clayton Silver Mines stock and no more or less, that amount of stock being at the time of the settlement and stipulation all of the Clayton Silver Mines stock owned by the defendant corporation. Likewise, if the appellees and the appellant corporation's alleged president at the time of the stipulated judgment were dealing at arm's length, why did they agree on the surrender by the appellees to the appellant corporation of 400,000 shares of their so-called common stock Class A, and why was it that appellees did not accept a settlement on a ratio which had been paid to the

common assessable stockholders? It would seem that if the common stock Class A owned by the appellees was valid and was not a void issue for lack of consideration that it was unnecessary to surrender for cancellation any of such stock (tr. 46).

The amended petition alleges clearly that the appellees wilfully closed their eyes to information in respect to fraudulent transactions which were not only within their reach but which were actually known to them. The notice of this fraud under the allegations of the amended petition is directly imputed to the appellees. (*Wecker vs. Enameling Company*, 204 U. S. 176, 185; 51 Law Ed. 430). The appellees as a matter of fact had actual knowledge. There was no question of any strained construction of the law of notice in order to impute it to them.

CONCLUSION

We are confident that the court will agree with the position taken in this brief that the appellees were not minority or majority stockholders standing in an arm's length position to the appellant corporation at the time they entered into their stipulated judgment. The disposition of this case, so far as the merits of the controversy are concerned, relates solely to whether or not the appellant's amended petition alleges sufficient facts, which must be deemed to be admitted by the appellees herein, to constitute ground for the taking of evidence as to the merits of the facts alleged in respect to the fraud participated in by the appellees in the procurement of what we believe to be a collusive judgment against the appellant corporation and its stockholders. We submit that if the allegations contain facts bringing the charge of fraud and collusion of the appellees within the application of the doctrine of extrinsic fraud, then the order and decree of the lower court should be reversed and the issues made in the amended petition should be determined on the merits of proof offered in support thereof. We submit that the allegations in the amended petition entitle the appellant to offer proof in support of its amended petition. (*Pacific R. Co. vs. Missouri P. R. Co.*, 111 U. S. 505, 28 L. Ed. 498.) It appears from the facts alleged that the so-called president of the appellant corporation, F. C. Keane, acting illegally and as an alleged officer of the company, dissipated almost all of its assets, and that while acting as its attorney as

well as its alleged president he attempted to protect himself by resort to a fraudulent compromise and stipulated judgment against the interests of the appellant corporation. The amended petition also shows that the appellees dealt with the alleged president of the appellant corporation, F. C. Keane, as an officer and director, full knowing that he was legally incapable of acting in such capacity. Therefore the appellees were knowingly parties to a fraudulent compromise and stipulated judgment against the appellant corporation, with Keane, the attorney for the corporation, protecting Keane, the defalcating officer.

Respectfully submitted,

R. MAX ETTER,

WILLIAM E. CULLEN,

WALTER H. HANSON,

Attorneys for Appellant.

Appendix
IN THE DISTRICT COURT
OF THE
UNITED STATES OF AMERICA
IN AND FOR THE DISTRICT OF IDAHO
NORTHERN DIVISION

ALMA KINGSBURY and
OLGA MARQUARDT,

Plaintiffs,

vs.

INDEPENDENCE LEAD
MINES COMPANY, an
Arizona Corporation,

Defendant.

No. 1603-N
(Amended)

MOTION TO VACATE AND
SET ASIDE JUDGMENT AND
REOPEN SAID CAUSE TO
ALLOW INDEPENDENCE
LEAD MINES COMPANY TO
FILE A PROPER ANSWER
AND TO REOPEN SAID
CAUSE FOR TRIAL.

Now COMES the above named defendant, INDEPENDENCE LEAD MINES COMPANY, an Arizona Corporation, and petitions this Court to vacate and set aside the judgment heretofore rendered on the 24th day of June, 1946, by stipulation without argument or trial, for the following reasons, to-wit:

I.

That said judgment provides for the distribution to said plaintiff, ALMA KINGSBURY, of 400,000 shares of stock of the defendant Company known as "Class

‘A’ Non-assessable Common Stock” and also provides for the distribution to OLGA MARQUARDT of 200,000 shares of such stock and said defendant Company alleges that no consideration has ever been paid to said Company for said stock and the same is wholly without consideration and void and if said judgment is to stand the said judgment should be amended to provide for the payment unto the defendant Company by said plaintiff, ALMA KINGSBURY, of \$400,000.00 in lawful money of the United States of America and the payment to said defendant Company by said plaintiff, OLGA MARQUARDT, of the sum of \$200,000.00 in lawful money of the United States of America, so as to make the said stock fully paid; where otherwise the said stock is a fraud upon the stockholders of the said defendant Company and is wholly without consideration and should be returned to the treasury of the said defendant Company.

II.

That at the time of the incorporation of the said defendant Company under the laws of the State of Arizona a capitalization of said Company was made with 3,000,000 shares of “Common Assessable Stock” of the par value of \$1.00 per share and 1,000,000 shares of stock called “Preferred, Non-Assessable Stock” of the par value of \$1.00 per share and later on or about the 10th day of February, 1932, said Articles of Incorporation were amended so as to provide that the said “Non-assessable Preferred Stock” of the par value of \$1.00 per share would surrender its prefer-

ence and would become and would be known as "Class 'A' Non-Assessable Common Stock" of the par value of \$1.00 per share; and representations were made at said time to all of the stockholders by its officers, including its President and Secretary, that the said stock would be held in the treasury of the Company as unpaid treasury stock subject only to being transferred or exchanged by the said defendant Company in the purchase of other mining properties from time to time during the existence of the said defendant Company.

That no new properties were ever purchased by the defendant Company in accordance with the expressed intention and representations of the officers and directors and trustees of the said Company to make said stock fully paid and said stock was and is wholly unpaid and should be returned to the treasury of the Company.

That during the year 1923, or thereabouts, Henry B. Kingsbury and Herman Marquardt, being then and there the President and Secretary, respectively, of the Independence Lead Mines, Ltd., an Idaho corporation, predecessor in interest to the mining properties of the defendant Company in the Hunter Unorganized Mining District in Shoshone County, Idaho, formed a corporation under the laws of the State of Idaho under the name of MINES FINANCE COMPANY, and the said Henry B. Kingsbury became the President thereof and the said Herman Marquardt became the Secretary and Treasurer thereof, and the said Kingsbury and the

said Marquardt became and were the sole stockholders of said MINES FINANCE COMPANY.

That the objects and purposes of the said Mines Finance Company were to take and receive all funds secured by the levying of assessments on the common stock of the Independence Lead Mines, Ltd., and to disburse the same under the direction and for the use and purposes of the President and Secretary of the said Mines Finance Company, being Henry B. Kingsbury and Herman Marquardt, who were the sole stockholders thereof, without any regard to the purposes for which said assessments were levied and to defraud the stockholders of the Independence Lead Mines, Ltd., of all control of the funds so secured by the levying of assessments and which said funds should have been deposited to the credit of the said Independence Lead Mines, Ltd., in its own treasury; and the said Mines Finance Company had no other source of revenue or income whatsoever; and the said Mines Finance Company continued to carry out such course of action until the formation of the present Company under the laws of the State of Arizona, being the defendant Company herein, and after the organization of said defendant Company the said Henry B. Kingsbury, Manager or President and controlling officer of both the Independence Lead Mines, Ltd., and the defendant Company, and Herman Marquardt, Secretary and Treasurer of said Companies; and likewise President and Secretary and Treasurer, respectively, of the Mines Finance Company, continued to levy assessments upon

the assessable stock of the defendant Company and to place said funds as levied in the Mines Finance Company for disbursement for their own purposes and accounts and in fraud of the assessable stockholders of the defendant Company; and between the time of the formation of the defendant Company and the end of the year 1938, the said Kingsbury and Marquardt levied thirteen (13) assessments upon the assessable stock of the defendant Company in the sum of 1c or 2c per share, amounting to many thousands of dollars of money levied upon and from the stockholders owning and holding the assessable common stock of the defendant Company and no assessments levied were ever levied upon or paid by the so-called "Class 'A' Non-assessable Common Stock" of the defendant Company and said stock is wholly unpaid and without any consideration.

III.

That at some time during or after the year 1930, the said Kingsbury and the said Marquardt, being then and there the Manager and Secretary of the defendant Company and directors and officers of said Company, and being then and there in complete control of the defendant Company and at the same time being, respectively, the President and Secretary of the Mines Finance Company and the sole stockholders thereof and in complete control thereof, for the purpose of unlawfully and illegally acquiring for themselves the ownership of the said 1,000,000 shares of "Class 'A' Non-assessable Stock" of the defendant Company, and

in violation of all representations heretofore alleged to have been made to the holders of common assessable stock, caused the same to be transferred to the Mines Finance Company of which the said Kingsbury and the said Marquardt were, respectively, President and Secretary and officers and directors thereof, and the sole stockholders thereof, without any consideration of any kind whatsoever being given for the said stock by the Mines Finance Company or the said Kingsbury or the said Marquardt, or any of them, and the said "Class 'A' Non-assessable Common Stock" of the defendant Company remained and is wholly unpaid and constitutes and is a fraudulent issue of stock of said defendant Company; and upon and against the holders of the common assessable stock of said defendant Company.

IV.

That the said Henry B. Kingsbury died during the month of June, 1940, leaving as his widow and sole heir at law the plaintiff, Alma Kingsbury, and the said Alma Kingsbury thereupon, through probate, became the owner of the stock in the Mines Finance Company theretofore held by her husband, Henry B. Kingsbury, and became an officer and director and stockholder in said Mines Finance Company.

That on or about the 31st day of December, 1941, the said Alma Kingsbury, being then and there an officer and director of the Mines Finance Company and the holder of two-thirds of the stock of said Mines

Finance Company, and the said Herman Marquardt being then and there an officer and director of the Mines Finance Company and the owner of the remaining stock thereof, being a one-third interest in the stock of the said Company, conspired together and caused to be issued unto themselves, without any consideration whatsoever, the "Class 'A' Non-Assessable Common Stock" of the defendant Company, being 1,000,000 shares of stock of the par value of \$1.00 per share, for which no consideration had ever been paid into the treasury of the defendant Company and issued two-thirds of said "Class 'A' Non-Assessable Common Stock," being 666,666 $\frac{2}{3}$ shares of stock to Alma Kingsbury and 333,333 $\frac{1}{3}$ shares of stock to the said Herman Marquardt; and the same was then and is now a continuing fraud upon the stockholders of the defendant Company and the holders of the common assessable stock thereof.

That on or about the 29th day of August, 1942, the said Herman Marquardt died testate in the County of Shoshone, State of Idaho, leaving as his sole heir his wife, Olga Marquardt, who succeeded to the ownership of said one-third share of the 1,000,000 shares of "Class 'A' Non-Assessable Common Stock" of the defendant Company in fraud of the rights of the holders of the common assessable stock of the defendant Company and without any consideration of any kind being paid therefor.

V.

That the said Henry B. Kingsbury and the said Herman Marquardt, being then and there officers, directors and trustees of the defendant Company in carrying out their intent to defraud the holders of the common assessable stock of the defendant Company and to defraud the said Company, illegally and against the laws of the State of Arizona and the State of Idaho, presented and issued and signed as President and Secretary all certificates of stock in the defendant Company as common stock of the par value of \$1.00 per share of 4,000,000 shares and did not print, or cause to be printed, upon said certificates or any of them, as required by the laws of the State of Arizona and the State of Idaho and the general laws of the states forming the United States of America, the differentiation in the classes of the two stocks so as to show to the sockholders and the purchasers of said stock that 3,000,000 shares of the common stock of the defendant Company were assessable stock and 1,000,000 shares of stock so held by the Mines Finance Company and later transferred to the plaintiffs, Alma Kingsbury and Olga Marquardt, as hereinbefore set forth, were non-assessable stock of the par value of \$1.00 per share for 1,000,000 shares, designated and shown as "Class 'A' Non-Assessable Common Stock" and thereby worked a fraud upon the holders of the 3,000,000 shares of assessable common stock, which fraud is a continuing one; the intent and purpose of said Kingsbury and said Marquardt being thereby the ownership of said "Class 'A' Non-Assessable Com-

mon Stock" to remain in permanent control of said Company without paying assessments while levying unlimited assessments on the common assessable stock and the said stockholders had no knowledge of the difference in the classes and values of said stock and all of the said stock being 1,000,000 shares of "Class 'A' Common Stock" is a fraudulent issue and should be set aside and returned to the treasury of the said Company for cancellation as non-assessable stock.

VI.

That the defendant Company, the Independence Lead Mines Company, since the death of Herman Marquardt in August, 1942, has been under the control and domination of F. C. Keane, of Wallace, Idaho, who acted as President of the Independence Lead Mines Company without any right or authority, as he was not a stockholder in said Company and had not been since sometime in the year 1940, and the said F. C. Keane, without any right or authority, appointed as so-called co-directors of the defendant Company, Glynn D. Evans and William Mullen of Wallace, Idaho, who served as officers and directors of said Company unlawfully and without any right or authority as neither the said Evans nor the said Mullen were ever, at any time, stockholders of the Independence Lead Mines Company and had no right or authority to act as such directors or officers.

That the said defendant is in possession of a sworn and verified written statement, dated November 29,

1947, made by William Mullen of Wallace, Idaho, that he was never appointed a Director of the Independence Lead Mines Company and never acted as such Director and never had any knowledge that he had been so appointed a Director or was held out to be a Director until long after the judgment had been entered in this controversy and that he never acted as a Director in any way; the said defendant has also in its possession an affidavit by Glynn D. Evans of Wallace, Idaho, dated November 29, 1947, to the effect that he never knew of any of the sales of the stock of the Clayton Silver Mines Company owned by the Independence Lead Mines Company being made and never authorized or agreed to the same.

That in August, 1944, the so-called Board of Directors of the Independence Lead Mines Company, or at least F. C. Keane and Glynn D. Evans, caused a dividend to be declared from the treasury of the company of stock of the Clayton Silver Mines Company, and that a portion of the meeting of the Board of Directors of that date is hereinafter quoted:

‘WHEREAS, the stockholders of Independence Lead Mines Company are insistent upon the distribution of a substantial portion of said Clayton Silver Mines stock,

NOW THEREFORE, BE IT RESOLVED that a distribution of 750,000 shares of the capital stock of Clayton Silver Mines be made to the common stockholders of Independence Lead Mines Company on the basis of one (1) share of Clayton Silver Mines for four (4) shares of Independence Lead Mines

Company stock held by all common stockholders, said distribution to commence on the 20th day of September, 1944, and that the shareholders of this company be required to send in their Independence Lead Mines Company stock for the purpose of receiving the Clayton dividend and that the Secretary stamp the Independence Lead Mines Company certificates so sent in showing that the Clayton Silver Mines distribution on said stock had been effected.

BE IT FURTHER RESOLVED that the Class A common stock of Independence Lead Mines Company do not participate in such distribution for the reason that there is a question as to the validity of said Class A common stock.'

That at the time of said meeting and the dividend declared thereat, there were outstanding 2,744,700 shares of issued assessable common stock of defendant company. The Company, after setting enough Clayton aside for this dividend had left undeclared in its treasury 314,825 shares of Clayton stock. Prior to the stipulation and judgment entered in this action, the said F. C. Keane had sold 218,000 shares of Clayton stock belonging to the treasury of the defendant Company and had converted the sales price of said stock to his own account and to his own personal use and benefit.

That at the time of the stipulation and judgment entered in this action the defendant Company had left in its treasury 96,825 shares of Clayton stock and had under its control 73,175 shares of Clayton previously declared, as above set forth, as a dividend to the com-

mon assessable stockholders, but as of that time undistributed.

That said 73,175 shares of Clayton were held in trust by the defendant Company and its then so-called officers for stockholders of the common assessable stock.

That on or about the 23rd day of June, 1945, the said Alma Kingsbury and Olga Marquardt, being then and there the holders of said "Class 'A' Non-assessable Common Stock," as aforesaid, caused this action to be instituted in this Court against the Independence Lead Mines Company, defendant, and the said defendant appeared through its President, F. C. Keane, in said cause and by answer alleged that the said issuance of said "Class 'A' Common Stock" and the holding thereof by the said plaintiffs, Alma Kingsbury and Olga Marquardt, was fraudulent and a fraud upon the holders of the common assessable stock of the said Company, and thereafter, without argument and without trial, the said F. C. Keane and certain of his co-attorneys in this action entered into a stipulation with the said plaintiffs by and through their attorney, H. J. Hull, of Wallace, Idaho, to settle the said controversy without argument or trial by allotting to the plaintiff, Alma Kingsbury, 400,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence Lead Mines Company and by allotting to the said plaintiff, Olga Marquardt, 200,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence Lead Mines Company and by further allowing and awarding to said plaintiffs in said proportion 170,000 shares

of stock of the Clayton Silver Mines Company and by further allowing and awarding to said plaintiffs the sum of \$10,050.00 and causing judgment to be entered and rendered against the defendant Company, in accordance with the terms of said stipulation aforesaid; and this Court, on the 24th day of June, 1946, entered such judgment in accordance with said stipulation. The defendant Company, the Independence Lead Mines Company, now asserts that the said judgment is fraudulent and is a fraud upon this Court and this defendant Company, and makes this motion to set aside the same so this defendant can assert its lawful rights and defend and protect the rights of the holders of the common, assessable stock of this defendant Company; that no disclosure was made to this Court that the award of 170,000 shares of Clayton to the plaintiffs would deprive common assessable stockholders of a dividend previously declared, in the amount of 73,175 shares of Clayton which was a trust for said common stockholders held by the defendant Company and its so-called President, F. C. Keane.

VII.

That F. C. Keane, acting as President of the defendant Company, the Independence Lead Mines Company, was in complete control thereof and had sold and disbursed all of the assets of said Company for his own use and benefit, as set forth in the complaint for Receivership, now pending in this Court in the case of *L. J. Hopkins et al vs. Independence Lead Mines Company et al*, being Civil Cause No. 1687 to which

reference is hereby made. And the said plaintiffs, well knowing that no stockholders' meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by the said Keane was illegal and void.

Upon information and belief the said defendant alleges the following, to-wit: That the said plaintiffs, prior to, and during the litigation herein, have claimed to be by many times the largest stockholders of the Independence Lead Mines Company and during said time lived in the Town of Wallace, Idaho, and for a part of said time had maintained therein the principal brokerage office and brokerage business in Wallace, known as Pennaluna & Company, and during all times were in close touch with the said business and knew of the affairs of the said Independence Lead Mines Company and were fully aware that F. C. Keane was not in fact legally the president of the said Company and well knew that said Company had no legal Board of Directors and well knew that the said F. C. Keane was selling large blocks of the Clayton Silver Mining Company stock held by the said Independence Lead Mines Company in its treasury and was applying the proceeds thereof to his own use and was dissipating the same; and the said plaintiffs claim to be such large stockholders of the Independence Lead Mines Com-

pany that they were in virtual control thereof; that the said plaintiffs failed and neglected to interfere in the affairs of the said Company well knowing that the same was being bankrupted by the so-called president of the said Company for the reason that they could secure and obtain a better settlement in connection with their own affairs and their ownership of the disputed Class "A" stock and the Clayton dividend that they claimed was due thereon by dealing with the said so-called president who desired to conceal the true condition of the affairs of the said Company and his own misdeeds in connection with its operations; and that by reason of the above said plaintiffs were fully cognizant of all said matters for a long time prior to the settlement made in this case and the judgment entered therein.

Defendant also alleges that on or about July, 1945, or shortly thereafter, and prior to the making of the said settlement and the entry of the stipulated judgment, the said plaintiffs and their said attorney became alarmed at the large sales of stock of the Clayton Silver Mines Company belonging to the said Independence Lead Mines Company and notified, in writing, the said Clayton Silver Mines Company and its officers at its office in Wallace, Idaho, to stop forthwith all further transfers of Clayton stock belonging to the Independence Lead Mines Company and that if any further transfers of said stock were made on the books of the said Clayton Silver Mines Company they would immediately bring injunction proceedings to prevent

further disposition and transfer of said stock as aforesaid.

Upon information and belief, the said defendant alleges the following: That the doings and transactions of the said F. C. Keane in regard to dissipating the cash and funds of the Independence Lead Mines Company and selling the stock of the Clayton Silver Mines Company belonging to the Independence and squandering and dissipating the funds realized therefrom for his own benefit, and the extent of the possession by the Independence Lead Mines Company of the sum of only 170,000 shares of Clayton, including over 73,000 shares held in trust for common assessable stockholders, were well known in all particulars to the said plaintiffs long prior to the settlement made in this controversy and the judgment entered therein.

That sometime prior to said settlement and compromise made in this action, one John Sekulic, being then and there a resident of the Town of Mullan, Idaho, promised and agreed with the said F. C. Keane that he could and would arrange a compromise and settlement of said controversy which the said F. C. Keane proposed to him (and by which proposal the said Keane instructed the said John Sekulic to propose to plaintiffs that Keane would pay over to them all of the stock of the Clayton Silver Mines Company remaining in the treasury of the Independence Lead Mines Company and also stock held as dividend previously declared by defendant and unsold by the said F. C. Keane and amounting in all to 170,000 shares of said Clayton

Silver Mines stock and for the sum of \$10,050.00 cash additional and also 600,000 shares of the Class "A" Common Stock, the legality of said Class "A" stock being then and there in dispute) providing the said F. C. Keane would pay to him, the said John Sekulic, the sum of \$10,000.00 cash as his fee and compensation for his said services immediately the said compromise and settlement was effected; and that further the said John Sekulic would inform the said plaintiffs that if they would not accept the said settlement they would receive nothing by any judgment secured against the Independence Lead Mines Company for the reason that said F. C. Keane would sell and dispose of all the remainder thereof and apply the funds to his own use and that he, the said John Sekulic, would further inform the said plaintiffs that the aforestated amount of stock of the Clayton Silver Mines Company was all of the stock remaining in the treasury, including stock that had been declared as a dividend but had not been paid out at the time to the common assessable stockholders and remained unclaimed as part thereof; that the said F. C. Keane agreed to pay to the said John Sekulic the sum of \$10,000.00 as his fees and compensation for his services in the same; that said John Sekulic immediately after said agreement approached said plaintiffs, or one of them, and arranged and made a compromise and settlement with the said plaintiffs upon the terms agreed and as set out aforesaid, and when he informed the said F. C. Keane that plaintiffs, in view of the circumstances heretofore related, would compromise their said claim, the said F. C. Keane

caused a stipulation to that effect to be entered in the pleadings in this cause and a judgment to be entered by this court carrying out the terms of the said settlement; and the said F. C. Keane paid over or caused to be paid over to the said John Sekulic the sum of \$10,000.00 as his fees and compensation for his services therein.

That at the time said compromise and settlement was made by the said John Sekulic the said plaintiffs by reason of the foregoing had full and complete knowledge of all of the said affairs of the Independence Lead Mines Company and well knew that they were securing all of the Clayton stock left in the possession of the Independence Lead Mines Company and including many shares of stock which were being held in trust by the said Company for the use and benefit of certain stockholders other than the plaintiffs under a dividend declared to them by said Company in August and September, 1944.

That for a long period of time the said Independence Lead Mines Company, and more particularly its president, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington, and the rules and regulations of the Spo-

kane Stock Exchange of Spokane, Washington; and the Secretary of the Securities and Exchange Commission threatened to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as president of the Independence Lead Mines Company and by Glynn D. Evans as Secretary of the said Company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company; that an additional report for the year 1946 was not filed as aforesaid until on or about the 20th day of May, 1947.

VIII.

That Chase A. Horning, of Wallace, Idaho, acting as one of the attorneys for the defendant, was paid and received the sum of \$10,000.00 from the said defendant in said settlement; and the said F. C. Keane, acting as one of the attorneys for said defendant, also received the sum of \$10,000.00 from said defendant.

IX.

That the said plaintiffs have never carried out the terms of settlement incorporated in the judgment of this Court on June 14, 1946, in that they have never

returned, or offered to return, to the treasury of the defendant Company, 400,000 shares of "Class 'A' Non-Assessable Common Stock" as provided in said judgment.

X.

That the said 1,000,000 shares of "Class 'A' Common Non-Assessable Stock" was transferred by them, the officers of the defendant Company, as is more fully set forth in paragraph III herein, and in complete control thereof, acting in collusion with themselves as officers of the Mines Finance Company and in complete control thereof and without any right or authority and the same is wholly void.

That the facts in regard to this transfer and other matters set out herein were never disclosed or discovered until after the new Board of Directors of the Independence Lead Mines Company were elected on the 26th day of May, 1947, and had acquired some of the books and documents and papers of the said Company; that all of the books of said Company have not, as yet, been turned over to the new Board of Directors.

That F. C. Keane, as one of the attorneys of record for the defendant Company, as well as its President and dominating director, by his actions prevented the defendant Company from presenting its defenses to this Court; that said F. C. Keane by filing his answer in this cause and by allegations therein contained caused stockholders to believe said matter would be contested; that the later stipulation and judgment pre-

vented stockholders from intervening in this cause; that the true state of affairs as regards the giving to the plaintiffs of the 73,165 shares of Clayton held in trust for common, assessable stockholders was not, and could not be, discovered until a new Board of Directors took possession of the books and records of the Company, as all facts were concealed by said Keane, for his own purposes and against the rights and in fraud of the interests and rights of the assessable stockholders of said Company and in fraud of this Court.

WHEREFORE, Independence Lead Mines Company, defendant, prays that the Court enter an order in the above entitled case providing as follows:

1. That the judgment of the Court heretofore entered in the above entitled cause on the 24th day of June, 1946, be vacated and set aside and held for naught.

2. That the parties hereto be restored to the same status as that obtaining upon the filing of the complaint in the above entitled case.

3. That defendant, Independence Lead Mines Company, be granted twenty days following any order of this Court vacating and setting aside the judgment heretofore rendered, for the purpose of pleading to said complaint by motion or answer as provided in the Federal Rules of Civil Procedure.

4. For such other relief as to the Court may seem just and equitable in the premises.

R. MAX ETTER,

WILLIAM E. CULLEN,

Attorneys for Defendant.

Post Office Address:

726 Paulsen Building,
Spokane, Washington.

(VERIFIED)

Fletcher Cyclopaedia Corporations, Permanent Edition, Vol. 13, Sec. 5829, pages 161 to 166:

“If the corporate officers or majority stockholders threaten or commit acts which constitute a breach of trust, or are fraudulent or unfair or otherwise wrongful, even if the acts are not beyond the powers of the corporation nor positively forbidden by statute or public policy, minority stockholders may sue to prevent or redress such injuries, provided the suing stockholders are themselves directly or indirectly injured by such acts, have not participated in or consented to such fraudulent or wrongful acts, act promptly, and provided further, as in all stockholders’ suits, relief cannot be obtained through the corporation itself. As has been well said, ‘while courts cannot compel directors or stockholders, proceeding by a vote of the majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise.’

“What constitutes fraud depends largely upon the facts of the particular case. In a clear case of fraud, little or no difficulty is experienced in granting relief; but there are many cases which involve acts which cannot be said to be actually fraudulent but which are wrongful as a breach of the trust imposed on those controlling the corporation, although within the powers of the corporation, and as to which relief will be granted minority stockholders. So the liability may be based on acts constituting actionable negligence. It is immaterial that the scheme is lawful on its face, and the rule has been laid down that ‘where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts interfere

and remedy the wrong.' Fraud, as the term is used in this connection, includes acts really oppressive to the minority stockholders, provided they are not merely a good-faith exercise of discretion in the management of the corporation; and the test as laid down in a leading case and generally followed or reiterated in other decisions and by other courts, at least as far as injunctive relief against majority stockholders is concerned, is that, 'in order to warrant the interposition of the court in favor of the minority stockholders * * * where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests.'

"Equity will never countenance any scheme to defraud, no matter how novel and ingenious. Actual dishonesty of those in control is not necessary. Fraud need not be shown as a fact nor need the individual stockholders be actuated by any fraudulent intent, but it is sufficient that the existence of fraud is the necessary legal inference from facts found."

Fletcher Cyclopaedia Corporations, Permanent Edition, Vol. 13, Sec. 5834, pages 173, 174, 175:

"While a stockholder may deal with the corporation, the dealing must be fair and free from actual fraud. If the owners of a majority of the stock of a corporation take advantage of their position and of their influence over the directors or other officers, to obtain an inequitable contract

with or conveyance or lease from the corporation, they perpetrate a fraud upon the minority, and the contract, lease or conveyance will be set aside in equity at the suit of dissenting stockholders. However, there is no presumption of fraud in a contract between a corporation and a majority stockholder, merely because of the relationship of the parties. But such contracts will be scrutinized with much greater care than if made with a third person. Even where fraudulent, such contracts are valid until set aside. It is no objection to setting aside a mortgage given by a corporation to the majority stockholder, as fraudulent, that at the stockholders' meeting authorizing the mortgage there was no dissenting vote.

“On the other hand, it is not fraudulent for a majority of the stockholders to purchase property needed by the corporation, at a time when it had no money to make the purchase, and thereafter, on fully disclosing all the facts, to sell it to the corporation at a large profit, although at its fair value. A lease by a majority stockholder to the corporation cannot be attacked where he is willing to convey the property to the company for what it cost him.”

United States
Circuit Court of Appeals
For the Ninth Circuit

INDEPENDENCE LEAD MINES COMPANY,
AN ARIZONA CORPORATION, APPELLANT

v.

ALMA R. KINGSBURY AND OLGA MARQUARDT,
APPELLEES

*Upon Appeal from the District Court of the United
States for the District of Idaho
Northern Division*

APPELLEES' BRIEF

H. J. HULL,
Wallace, Idaho

J. K. CHEADLE,
1301 Old National Bank Building,
Spokane, Washington

Attorneys for Appellees.

SEP 2 1948

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit

INDEPENDENCE LEAD MINES COMPANY,
AN ARIZONA CORPORATION, APPELLANT

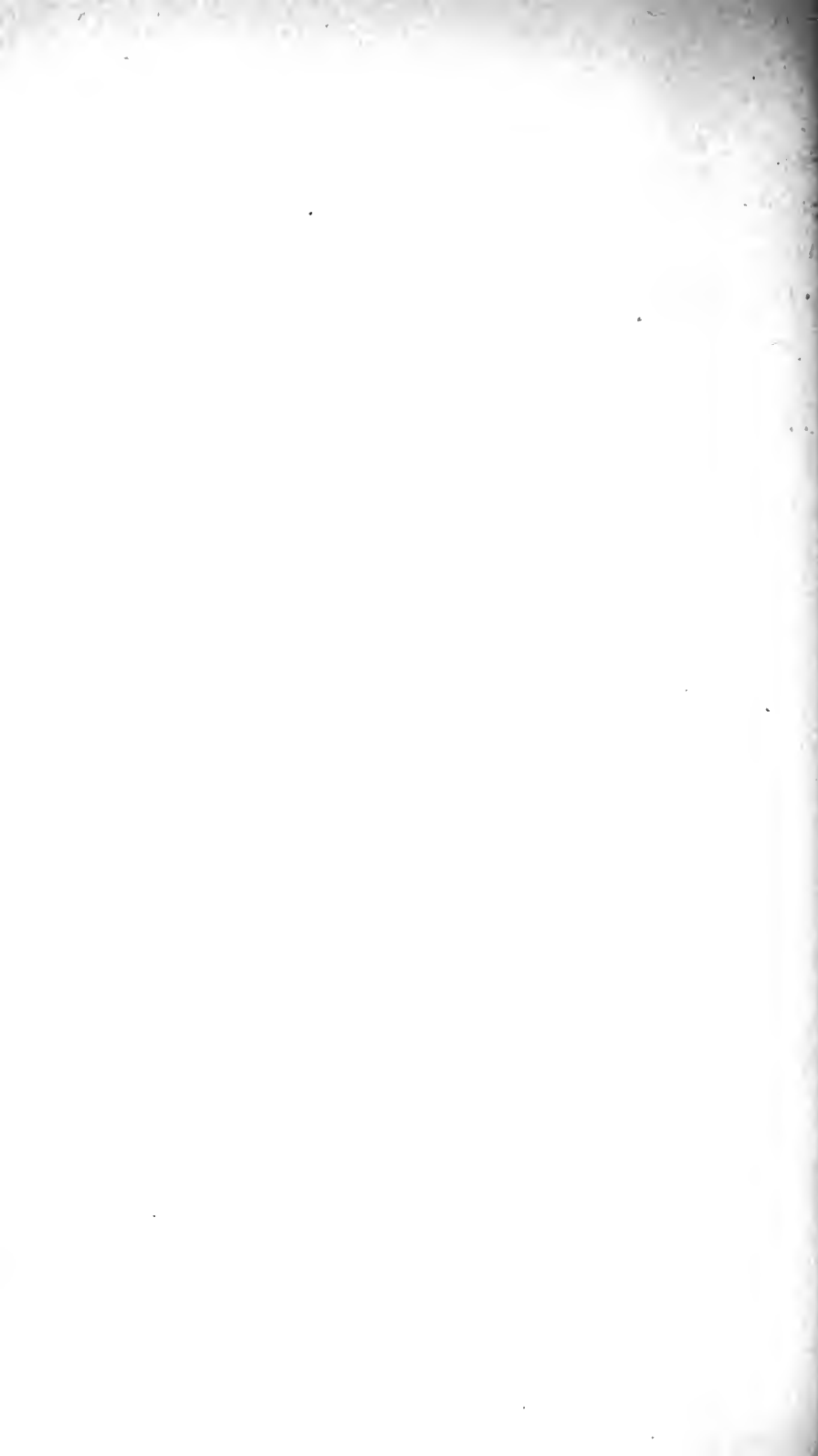
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STATEMENT OF THE CASE

Appellant's statement of the case (App. Br. 4-11) is controverted as being incomplete and as presenting primarily (App. Br. 4-8) matters which were adjudicated in the same case between the same parties by the 1946 judgment and decree appellant corporation now seeks to have vacated.

The basic question involved in this appeal is whether appellant corporation's amended petition (R. 50-64, 65-76) to vacate the judgment and decree fails to state a claim against appellees upon which relief could be granted. The judgment and decree, entered by the district court in the same case between the same parties on June 24, 1946 (R. 48-50), is in accordance with a stipulation of settlement between the parties (R. 45-47).

About a year after the stipulation, judgment and decree, appellant corporation filed its petition to vacate (R. 50-64). (Although entitled "motion," it has regularly been referred to as "petition.") Appellees moved to dismiss the petition on the ground that it failed to state a claim against appellees upon which relief could be granted (R. 65). Oral argument on that motion was heard on November 18, 1947, and points and authorities and briefs were submitted at the hearing (R. 77, 80). While the court had the matter under advisement, on December 6, 1947 (R. 77) appellant corporation served an amendment to its petition to vacate,

amending paragraphs VI and VII (R. 65-76). Appellees, on the same ground, moved to dismiss (R. 79), the amended petition. By stipulation (R. 77-78), the November 18, 1947 hearing was deemed a hearing on the motion to dismiss the amended petition and further briefs were filed.

The district court on February 9, 1948, having "fully considered the motions and other records and files in this cause," entered its order granting the motion to dismiss (R. 79-80). Thereafter, appellant corporation having advised the court that it desired to stand on its petition, as amended, and having declined to plead further, the court entered its order dismissing the amended petition (R. 80-82). Thereupon, this appeal was taken.

The record shows facts and circumstances of the litigation, concluded by the stipulation, judgment and decree of June 1946, which are not mentioned in appellant corporation's statement of the case (App. Br. 4-11), and which are material to consideration of this appeal.

In July 1945, about one month after appellees Kingsbury and Marquardt filed their complaint (R. 2-33) against appellant corporation, *Chas E. Horning* and F. C. Keane, as attorneys for appellant corporation, moved to dismiss the complaint (R. 34). *Chas. E. Horning*, as well as F. C. Keane, was an attorney for appellant corporation through-

out the litigation that concluded with the stipulation, judgment and decree of June 1946.

After a hearing, the court on November 30, 1945 denied the motion to dismiss appellees' complaint, and gave appellant corporation ten days in which to file its answer (R. 34-35). Appellees filed a motion for default, in April 1946, with the notice of motion addressed to appellant corporation and to F. C. Keane and Chas. E. Horning, its attorneys (R. 35). In the uncontradicted affidavit (R. 36-38) supporting the motion for default, it is stated that appellant's attorneys, Chas. E. Horning and F. C. Keane, several times requested and obtained extensions of time within which to serve and file answer, the last extension expiring January 17, 1946.

After appellees' motion for default, appellant corporation on April 29, 1946 filed its answer, subscribed by appellant corporation's attorneys *Chas. E. Horning, Eugene F. McCann* and F. C. Keane (R. 38-43).

On June 22, 1946, appellant corporation through its signatory attorneys, F. C. Keane, Eugene F. McCann and Chas. E. Horning, entered into the stipulation (R. 45-47) which compromised and settled the case.

Judge Clark's judgment and decree (R. 48) recites:

"This cause came on to be heard upon the pleadings at Coeur d'Alene, Idaho, the 24th

day of June, 1946, before the Court sitting without a jury, the plaintiffs being represented by their attorney, H. J. Hull, and the defendant by its attorneys, F. C. Keane, *Eugene F. McCann* and *Chas. E. Horning*. (Italics added) "Thereupon the parties filed herein their stipulation that judgment be entered herein in favor of the plaintiffs and against the defendant, and the Court having examined the pleadings, and the stipulation, and having heard and considered the evidence adduced in support thereof, and being now fully advised in the premises:

"It is hereby ordered, adjudged and decreed and this does order, adjudge and decree:"

The amended petition to vacate the judgment (R. 50-64, 65-76) does not allege any fraud, lack of authority, professional neglect or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, appellant corporation's attorneys who signed the stipulation and represented appellant corporation in connection with the judgment and decree.

The first five paragraphs of appellant corporation's amended petition to vacate the consent judgment and decree (R. 50-58) merely reallege, with elaboration, the allegations of fraud made by appellant corporation in its April 1946 answer (R. 39-40).

Further statements as to allegations contained in the amended petition to vacate are left to the Argument section of this brief. But reference again

is made to the petition itself (R. 50-64) and to the amendment to the petition (R. 65-76). It is on the petition to vacate, as amended, that appellant corporation elected to stand.

The basic question is whether the district court, having fully considered the motion to dismiss the amended petition, and the other records and files in this cause (R. 79-80), abused its discretion in dismissing appellant corporation's amended petition to vacate the judgment and decree which had been entered pursuant to appellant corporation's stipulation.

SUMMARY OF ARGUMENT

Appellees' basic contention is that appellant corporation's amended petition to vacate judgment fails to state a claim against appellees upon which relief could be granted. — The judgment now attacked is based upon and is in accordance with a stipulation of settlement to which appellant corporation is a party.

- I. The amended petition's alleged fraud, which prior to judgment was alleged in appellant corporation's 1946 answer, is now *res adjudicata*. — It is well settled law that fraud which was in issue, or could have been dealt with, in litigation concluded by a judgment can not be made the basis of an attack on that judgment.

- II. The courts uniformly hold that relief against a judgment for fraud will be granted only where the successful party practiced the fraud in the procurement of the judgment. — And appellant corporation has not cited any case holding otherwise.
- III. The amended petition does not allege any fraud practiced by or on behalf of appellees in the procurement of the judgment. — Furthermore, appellant corporation's argument, that appellees participated in fraud in procuring the judgment, is unsupported by the amended petition's allegations; it is unsupported by the cases cited by appellant; and it is contrary to established law. — The amended petition comes closer to alleging coercion of appellees than it does to alleging fraud practiced by appellees.
- IV. The law favors settlement of litigation; and in the absence of fraud practiced by appellees in its procurement, the stipulated judgment will not be set aside. — F. C. Keane and other officers of appellant corporation were at least *de facto* officers; and in any event their authority can not be attacked collaterally in this litigation. — Moreover, appellant corporation's amended petition does not contain any allegation of fraud, lack of authority, lack of dili-

gence or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, attorneys who (as well as F. C. Keane) represented appellant corporation in the litigation and signed the stipulation of judgment.

The district court obviously acted well within its sound legal discretion in dismissing appellant corporation's amended petition to vacate judgment.

ARGUMENT

I

The amended petition's alleged fraud, which prior to judgment was alleged in appellant corporation's 1946 answer, is now res adjudicata.

The allegations of fraud contained in the first five paragraphs of appellant corporation's petition to vacate (R. 50-58) are merely elaborated allegations of the same matters alleged in paragraph V of the corporation's answer filed April 29, 1946 (R. 39-41). It should be noted that, in paragraph VI of its amended petition to vacate (R. 69), appellant corporation expressly alleges that in its answer, prior to judgment, it did allege said fraud.

By the judgment and decree of June 24, 1946 (R. 48-50) that alleged fraud became res adjudicata.

Obviously, that alleged fraud, even if true as it is assumed to be by the motion to dismiss, could

not possibly have been fraud practiced in the procurement of the June 1946 judgment. That alleged fraud having been alleged in appellant corporation's April 1946 answer in the litigation which was settled and concluded by the June 1946 judgment now attacked, appellant corporation obviously was aware of any such alleged fraud when it effected the compromise settlement.

The leading case of *United States v. Throckmorton*, 98 U. S. 61, 68, 25 L. Ed. 93 (1878) lays down the rule that fraud which was in issue in litigation concluded by a judgment can not be made the basis of an attack on that judgment. That rule of the Throckmorton case is still in effect and is regularly applied by the Federal courts and the Idaho court.

Toledo Co. v. Computing Co., 261 U. S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719 (1923);

Brady v. Beams, 132 F. (2d) 985, 986, 987 (C. C. A. 10th 1942) cert. den. 319 U. S. 747;

Josserand v. Taylor, 159 F. (2d) 249, 251-256 (C. C. P. A. 1946);

Bradburn v. McIntosh, 159 F. (2d) 925, 932 (C. C. A. 10th 1947);

Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 84-86 (1906);

Zounich v. Anderson, 35 Idaho 792, 208 Pac. 402, 403 (1922);

Boise Payette Lumber Co. v. Idaho Gold Dredging Corp., 56 Idaho 660, 58 P. (2d) 786, 802 (1936).

In *Toledo Co. v. Computing Co.*, supra, the Supreme Court refused to permit a decree to be attacked on the ground of alleged fraud, when the court rendering the decree attacked had before it the same issue of fraud. The court found it unnecessary to consider the distinction between intrinsic and extrinsic fraud, stating:

“We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, because, *in any case, to justify setting aside a decree for fraud, whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails.* That is the case here.” (Italics added)

In *Brady v. Beams*, supra, (in which case the Supreme Court denied certiorari) the 10th Circuit Court of Appeals held, upon the authority of the Throckmorton case, that the court will not set aside a judgment for fraud which was in issue in the suit concluded by the judgment attacked. And the court stated:

“It is a rule of consistent observance that discovery of the alleged fraud after entry of the judgment attacked, not before, is an essential element of an action of this kind. (Citing many cases) That element is not present here and its absence is fatal.”

The doctrine of res adjudicata applicable to the alleged fraud which was set forth in appellant corporation's April 1946 answer, which was disposed of by the June 1946 judgment, and which appellant corporation now alleges again in the first five paragraphs of the petition to vacate judgment, has recently been recognized and applied by the Supreme Court. In *Angel v. Bullington*, 330 U. S. 183, 192, 67 S. Ct. 657 (1947) the court held:

"The doctrine of res adjudicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, e.g. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, 244, 88 L. Ed. 1250, 1255, 64 S. Ct. 997. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

See also: *King v. Richardson*, 54 Idaho 420, 33 P. (2d) 1070 (1934).

As for the balance of the amended petition to vacate, paragraphs VI to X (R. 58-63, 65-76), it fails to state a claim against appellees upon which relief can be granted, because it fails to allege any fraud practiced by appellees or anyone on their behalf in the procurement of the judgment.

II

Relief against a judgment for fraud will be granted only where the successful party practiced fraud in the procurement of the judgment.

The Supreme Court in *United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 31, in laying down the rule which limits relief against a judgment for fraud to those cases in which the fraud is extrinsic, also recognized that the exception to the general rule or doctrine of *res adjudicata* is for those cases in which the successful party practiced the fraud. As the court stated:

“there is an admitted exception to this general rule in cases where, *by reason of something done by the successful party to a suit*, there was in fact no adversary trial or decision of the issue in the case.” (Italics added)

In *Miller Rubber Co. v. Massey*, 36 F. (2d) 466, 467 (C. C. A. 7th 1930), cert. den. 281 U. S. 749, there was an attempt to enjoin collection of a judgment entered in an earlier case. The district court granted relief; but the circuit court of appeals reversed with a direction to dismiss the bill; and the Supreme Court denied certiorari. As stated in the opinion of the appellate court (36 F. (2d) 466, 467):

“The testimony conclusively established these two facts: (a) Solely through default of their counsel, appellees failed to appear at the trial of the action and were thus prevented from offering their evidence in support of the two

defenses pleaded. (b) The default of appellees' counsel was in no way attributable to appellant or its counsel. These facts present a bald legal question, which must be answered against the contention of appellees. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; * * * 15 R. C. L. 756, 757.

“The two well-established maxims of the law, interest rei publicae, ut sit finis litium, and nemo debet bis vexari pro una et eadem causa, have certain exceptions. *But the exceptions are limited to cases where the opposing party or its agent prevented a fair trial.* Where there has been no bono fide adversary trial, courts of equity are anxious to grant relief so that complete justice may be done. But their willingness so to act is limited to cases where the unsuccessful party has been prevented from presenting the full strength of its case *by reason of something done, something misleading or deceptive practiced by the successful party.* No case has been cited to us where relief was granted without a showing that the successful party participated in, or connived at, the misconduct which led the defeated party to neglect or ignore one or more of its defenses.” (Italics added)

See also: *Van Gilder v. Warfield's Unknown Heirs and Devises*, 63 Idaho 328, 120 P. (2d) 243, 245 (1941).

The well established law on this point is reflected in the *Restatement of the Law of Judgments*:

Sec. 122 (p. 593)

“Subject to general equitable considerations (see Secs. 127-130), equitable relief from a valid judgment will be granted to a party to

the action injured thereby if in the action he was prevented from having a fair trial because of the bribery of or duress upon his attorney, agent or other person in charge of the action or defense, *by the other party to the action.*" (Italics added)

Comment (p. 596)

"e. *Collusion or duress.* There is collusion where a party to an action or someone acting on his account induces a fiduciary to neglect, or to act contrary to, the interests of the beneficiary. This may be accomplished by a money payment or promise of future benefits to the fiduciary, or by causing him to act out of friendship or by persuasion. *Mere knowledge that the fiduciary is neglecting the interests of the beneficiary does not constitute collusion; there must be some cooperation or activity in causing him to act wrongfully.*" (Italics added)

Appellant corporation has not cited a single case that holds otherwise than the controlling authorities referred to above. Regarding relief against a judgment for fraud, appellant's brief cites only the cases discussed in the following paragraphs:

In *Hanna v. Bricton Mfg. Co.*, 62 F. (2d) 139, 148 (C. C. A. 8th 1933), (App. Br. 19), the defendants were the successful parties, in an earlier suit, and others for whom the successful parties had acted. The defendants fraudulently had managed to keep notice of the earlier suit from reaching the defendant company. The court held in the later action to vacate that the successful parties

in the earlier suit by their fraud had imposed on the court and had prevented the company from making a full and fair defense.

Likewise, in *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346 (1904), (App. Br. 26-28), the successful party in the earlier action had obtained the decree by his fraud and by his collusion with the president of the unsuccessful corporation.

Likewise, in *Manahan v. Petroleum Producing & Refining Company*, 198 App. Div. 192, 189 N. Y. S. 127 (1921), (App. Br. 28), the court vacated the judgment attacked because it had been procured by a fraud knowingly perpetrated by the plaintiff and the president of the defendant corporation.

In the case of *In Re Interborough Consolidated Corporation*, 288 Fed. 334 (C. C. A. 2nd 1923), (App. Br. 30), the court did state the same rule quoted from *Corpus Juris* on page 30 of appellant corporation's brief. But in that case the court held said rule to be inapplicable, because those seeking to invoke the rule were creditor-bondholders and not stockholders. In any event, said rule is applicable to contests between stockholders having rights in a dividend fund and other creditors, and has no bearing on the question involved in this appeal.

In *Wecker v. National Enameling & S. Co.*, 204 U. S. 176, 185, 27 S. Ct. 184, 51 L. Ed. 430 (1907),

(App. Br. 31), the plaintiff sued a foreign corporation in a Missouri state court and joined a Missouri individual as defendant, for the purpose of defeating the corporation's right to remove the case to the federal court. Plaintiff alleged that the individual was a supervisory employee of the corporation, but the individual defendant was shown in fact not to be such. Plaintiff had knowledge of the fact or was in a position to ascertain the fact, since plaintiff was an employee of the corporation. If there was any fraud in that case, it was fraud practiced by the plaintiff—so to speak, fraud in attempted procurement of exclusive state court jurisdiction. Obviously, neither the facts nor the law involved in that case are pertinent to this appeal.

In *Pacific R. R. Co. of Mo. v. Mo. Pac. R. R. Co.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498 (1884), (App. Br. 32), the court, on demurrers, upheld an attempt by the mortgagors to vacate a decree of foreclosure entered in an earlier suit. As the court's opinion points out, many of the plaintiffs and defendants in the foreclosure suit conspired and acted together fraudulently, both in setting up fictitious and unlawful mortgage debts and in the conduct of the foreclosure suit. The attorney for the mortgagor railroad, one Mr. Baker, had fraudulent association with the parties who were plaintiffs in the foreclosure suit and defendants in the proceeding for relief against the decree. Mr. Baker prepared the complaint for foreclosure; he had it served

on himself; he then put in an answer admitting false allegations; he gave instructions to the solicitors for the plaintiffs in the foreclosure suit and they acted in accordance with his instructions; and finally Mr. Baker bought in the property at the foreclosure sale. — That case obviously was one in which the successful parties and their attorneys actively participated in the fraud which prevented a fair trial.

Examination of the cases cited by appellant corporation shows that it is accurate to state in connection with this appeal, as the court stated in *Miller Rubber Co. v. Massey*, 36 F. (2d) 466, 467 (C. C. A. 7th 1930), cert. den. 281 U. S. 479 (p. 12 *supra*):

“No case has been cited to us where relief was granted without a showing that the successful party participated in, or connived at, the misconduct which led the defeated party to neglect or ignore one or more of its defenses.”

III

The amended petition does not allege any fraud practiced by or on behalf of appellees in the procurement of the judgment. —

Furthermore, appellant corporation's argument, that appellees participated in fraud in procuring the judgment, is unsupported by the amended petition's allegations; it is unsupported by

the cases cited by appellant; and it is contrary to established law. —

The amended petition comes closer to alleging coercion of appellees than it does to alleging fraud practiced by appellees.

Appellant corporation in its argument contends that: "The amended petition alleges participation by appellees in fraud in the procurement of the stipulated judgment" (App. Br. 18). But neither the allegations in the amended petition nor the cases cited by appellant support that contention. Moreover, the very allegations themselves rebut appellant corporation's "factual" argument.

Much of appellant's "factual" and legal argument (App. Br. 20-31) is to the effect that appellees owed fiduciary duties to the corporation and its other common stockholders—although the amended petition itself contains allegations that appellees were stockholders of merely 25% of the stock in the corporation, and that appellant corporation had discriminated against appellees' stock in declaring the Clayton dividend and had questioned the validity of the stock held by appellees. In its strained and strange argument, appellant corporation contends that (App. Br. 21):

"The situation presented here is a course of dealing between the appellant corporation and the appellees where the appellees because of their relationship to the corporation had actual

knowledge of the corporation's affairs, and also had, because of their large stock ownership and active interest and dealings with the appellant, an actual domination of the corporation."

However, the "course of dealing" as shown by the very allegations of the amended petition was one in which appellant corporation not merely had put appellees at arms length, but also had discriminated against appellees' stock in the declaration of the Clayton dividend and also had questioned the validity of appellees' stock. The amended paragraph VI of the petition (R. 67-68) contains an allegation of a portion of the minutes of the meeting at which the Clayton dividend was declared; and said allegation shows the discrimination against appellees' Class A common stock and shows that appellant corporation questioned the validity of said stock. — It was to assert their right to participate in the declared dividend made up of Clayton stock that appellees brought suit against appellant corporation.

A stockholder's right of action against the corporation to recover a dividend after it has been declared is a right of action held by the stockholder in his individual capacity. *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 13, p. 282, sec. 5922. And after declaration of the dividend, all community of interest in relation to the dividend, as between the stockholders and the corporation is at

an end. Moreover, the action to recover the dividend "may be maintained, not only by stockholders who have been recognized by the corporation as entitled to share in the dividend, but also by those who have been wrongfully denied the right to share therein, * * *" *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 11, pp. 908-910, sec. 5365.

Thus, all community of interest between appellees and appellant corporation, in relation to the Clayton stock, was at an end. Appellees, in their individual capacities, were asserting against appellant corporation their right of action to recover the dividend of Clayton stock.

Furthermore, the situation was clearly one in which, in accordance with well settled rules, there cannot be imputed to appellees knowledge of what went on within the appellant corporation.

"A stockholder is not bound to the strict rule as to knowledge of the affairs of a corporation that applies to directors and officers." *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 13, p. 27, sec. 5711.

Stockholders of a corporation are not its agents simply because of their status as stockholders. Therefore, as stated in *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 1, p. 131, sec. 39:

"The declarations and admissions made by stockholders or members are not those of the corporation, and are not admissible as evidence against it. *For like reasons the acts of the cor-*

poration are not the basis of an estoppel in pais against the members, and the converse would also be true.

* * * *

“Equities, such as unclean hands, cannot be imputed to the stockholders of the corporation from the other’s conduct, if there was equity in the party to the suit.” (Italics added)

In vol. 3, p. 96, sec. 814 of *Fletcher Cyclopedia Corporations* (Perm. Ed.), it is stated that since the stockholders of a corporation, individually, are not its agents, the rule is well settled that notice to individual stockholders who are not also officers of the corporation, or knowledge of facts possessed by such stockholders, is not notice to the corporation. For the same reasons, the converse follows—knowledge of what goes on within the corporation is not imputed to individual stockholders who are not officers or directors of the corporation.

Referring again to the alleged minutes in the amended paragraph VI (R. 67) and to Fletcher’s work on corporations: “all community of interest in relation to such [Clayton] dividend, as between the stockholders themselves and between the [appellees] stockholders and the [appellant] corporation is at an end.” *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 11, pp. 908-910, sec 5365.

Surely appellees’ pressing their right of action to recover the dividend, that right being held by them in their individual capacities, and their press-

ing that right by way of litigation, placed appellees and appellant corporation at arms length as regards the subject matter of the litigation.

In contending otherwise, appellant corporation disregards the well settled law as to a stockholder's right of action against a corporation to recover a dividend after it has been declared.

Moreover, appellant corporation in its contention that appellees had actual domination of the corporation by reason of their stockholding, makes in its brief statements or assumptions of fact which are contrary to allegations in the amended petition. Appellant corporation, by such contention, also plays both ends against the middle with inconsistent arguments.

As is shown in the stipulation and judgment and decree (R. 45-50), appellees held 1,000,000 shares of Class A common stock. And as alleged in paragraph V of the petition to vacate (R. 57) said 1,000,000 shares of Class A common stock held by appellees was only 25% of the 4,000,000 shares of stock in appellant corporation. At the conclusion of said paragraph V of the petition to vacate (R. 58), appellant corporation alleges that the 1,000,000 shares of Class A common stock is a fraudulent issue and should be set aside and returned to the company for cancellation.

Thus, the amended petition shows that appellant

corporation seeks to base the so-called "control" or "domination", which appellant corporation now contends the appellees had, principally upon the million shares of Class A stock, the validity of which appellant corporation questioned in August of 1944 and denied in its answer of April 1946 and the validity of which, notwithstanding the judgment of June 1946, appellant corporation now seeks to have relitigated. — Appellant corporation, nevertheless and inconsistently, now assumes that said stock was valid, for the purpose of appellant corporation's inferential contention that appellees were under a duty to abandon their claim that dividend rights went with said stock, and to use the so-called "control" which said stock gave them to attempt to clean up the internal mismanagement of the appellant corporation which was denying the validity of said stock and the dividend rights that went with it.

Instead of "control", appellees had only 25% of the stock in appellant corporation, and appellant corporation was denying the validity of that stock. Its validity was recognized by appellant corporation in the stipulation for the judgment and decree of June 24, 1946 (R. 45-50); and now appellant corporation seeks to relitigate its validity.

Furthermore, and aside from the so-called "control" which appellant contends appellees had, appellant corporation has not cited any authority

which supports its contention that it was incumbent on appellees to abandon their cause of action against appellant corporation and to devote themselves, as stockholders, to improving the internal management of appellant corporation.

In *Dodge v. Scripps*, 179 Wash. 308, 37 P. (2d) 896, 900 (1934), (App. Br. 22, 23), the defendant Scripps not only controlled his family's holdings of 70% of the stock, he was also treasurer of the corporation and chairman of the board. But the court refused to enjoin the major stockholder-officer from selling plaintiff's stock which was pledged to the corporation. That case does not support appellant corporation's contention.

In *re Los Angeles Lumber Products Co.*, 46 F. Supp. 77, 81 (D. C., S. D. Calif. 1941), (App. Br. 22) involved a breach of fiduciary duties owed by a Mr. Faries who was a vice-president, a director and the attorney for the corporation. That case might support an action by appellant corporation against F. C. Keane, but it does not support appellant corporation's contention that fiduciary duties were owed by appellees who were merely stockholders asserting their claim to a dividend.

Morse v. Metropolitan S.S. Co., 87 N. J. Eq. 217, 100 At. 219, 221 (1917), (App. Br. 23), involved primarily the question whether appointment of a receiver would disrupt the corporation's business; inferentially it appeared that the corporate direc-

tors were "dummies" controlled by and taking instructions from one Mr. Robbins. That case might be relevant in an action against F. C. Keane; but it is no authority for appellant's attack against the judgment and decree in this case on appeal.

In re Kansas City Journal-Post Co., 51 F. Supp. 1009, 1014, 1015 (D. C., W. D. Mo. 1943), (App. Br. 23), involved a dominant stockholder, one Mr. Schapiro who had bought all of the stock and bonds of the corporation. But the case was decided, in his favor, on the point that he had no fiduciary obligation at the time of his purchase. That case clearly has no bearing on this appeal.

Heimbaugh v. Hitchcock, 115 Kan. 182, 222 Pac. 114 (1924), (App. Br. 23), was an action against a stockholder who owned all of the preferred and 92% of the common stock and who controlled an additional 6% of the common. His wrongful action was in effecting a modification of the corporation's charter, cancelling the preferred stock and having common issued to take its place. For appellant corporation's purpose, there is no similarity between that case and the situation of appellees, owners of 25% of the stock, asserting in their individual capacities their right to a dividend against appellant corporation which denied their right to the dividend and questioned the validity of their stock.

Appellant corporation in citing *Levy v. American*

Beverage Corp., 265 App. Div. 208, 38 N. Y. S. (2d) 517, 524, 525 (1942), (App. Br. 22), presents an authority which is definitely contrary to appellant's contention. The New York court, in refusing to hold that a majority stockholder, as such, was a fiduciary for other stockholders, stated:

"Stockholders are not ipso facto trustees for one another. * * *

"A majority stockholder does not become a fiduciary for other stockholders by reason merely of ownership of his stock. It is only where he steps out of his role as a stockholder, and acts in the management and conduct of the corporation, with disregard of the interests of the corporation and of the minority stockholders that he is said actually to become a fiduciary instead of a mere stockholder."

The cases appellant cites either fail to support appellant's argument or rebut it. — And the allegations in the amended petition not only fall short of alleging any fraud on the part of appellees; some of the allegations, assuming them to be true, come closer to alleging coercion of appellees than to alleging fraud practiced by appellees.

The second sub-paragraph of the petition's amended paragraph VII (R. 71-72) is all alleged on information and belief. It is a strain on credulity to assume that *anyone* with a claim against a corporation, whether the claim were disputed or recognized by the corporation, — "(well knowing that the same [corporation] was being bankrupted by

the so-called president of the Company)” (R. 72) would sit back and not attempt to stop the bankrupting “for the reason” (R. 72) that the claimant could more easily settle with the defalcating bankrupter. — But admitting for the purpose of the motion to dismiss such facts as are well pleaded on information and belief, there is still no allegation in paragraph VII (or elsewhere in the amended petition) that shows fraud or connivance practiced by appellees or their attorney or anyone acting for them. The alleged information which it is alleged appellees received shows the contrary. The alleged information received by appellees through their own business connections, according to the second sub-paragraph of VII, and from one John Sekulic, according to a later sub-paragraph, would have amounted to information and threats which caused appellees to compromise and settle on terms proposed on behalf of appellant corporation.

Admitting, as the motion to dismiss must, the allegations of fact in the third sub-paragraph of amended VII (R. 72), the alleged notice given to the Clayton company in July 1945 was consistent with appellees’ pressing their claim and their lawsuit (commenced in June 1945) against appellant corporation. Said alleged notice to the Clayton company was just the opposite of connivance by appellees or their attorney with F. C. Keane.

The fourth sub-paragraph of amended VII (R. 73) alleges, upon information and belief, substan-

tially the same matters as the second sub-paragraph, more general in some respects, more detailed in others.

The fifth sub-paragraph of amended VII (R. 73-75) alleges that one John Sekulic acted as agent for President F. C. Keane in arranging the compromise and settlement with appellees. It alleges that Sekulic, instructed and subsequently paid by Keane, "informed" appellees that if they did not accept the settlement proposed by him, then they would receive no Clayton stock at all, because Keane would sell or dispose of all that was left and put the funds to his own use. Admitting the facts well pleaded, the fifth sub-paragraph alleges in effect that Sekulic put up to appellees the terms of the compromise and settlement on a "this-or-nothing" basis, and that appellees accepted. These are allegations that Keane, through Sekulic, used Keane's alleged defalcations and a threat of further defalcations to persuade appellees to accept the terms of the compromise and settlement. — This does not allege connivance by appellees. It comes closer to alleging coercion of appellees.

The sixth sub-paragraph of amended VII (R. 75) alleges that appellees had information of appellant corporation's affairs by reason of Sekulic's alleged activities.

The seventh and last sub-paragraph of amended VII (R. 75-76) contains allegations, entirely unre-

lated to appellees, that likewise show no connivance or fraud practiced by appellees in procuring the judgment and decree of June 24, 1946.

On page 30 of its brief, appellant corporation refers to the fact that the compromise settlement and consent judgment resulted in appellees taking a reduction of 80,000 shares of the Clayton stock which they claimed and surrendering 400,000 shares of the Class A common stock which they held. Then appellant corporation, by way of rhetorical inquiries and conclusion (App. Br. 30-33), suggests that those provisions of the settlement which were favorable to appellant corporation should be the basis of an inference that the consent judgment was a fraud on appellant corporation and the court. Thus, appellant corporation having in the middle of its brief (pp. 24-25) inferred that appellees should be charged with fraud for not dropping their cause of action against appellant corporation and attempting to correct the alleged internal misconduct, proceeds a few pages later to infer that there was fraud practiced by appellees because they did not press their cause of action to its full extent. — And when the clutter of these confused and inconsistent arguments is left, for a view of the allegations in the amended petition, appellant corporation is found in paragraph VII (R. 73-74) to have alleged that, acting for President Keane, one John Sekulic put the terms of the compromise settlement to appellees on a “this-or-nothing” basis,

backed by the alleged threat that if appellees did not accept, then Keane would misappropriate to his own use all remaining Clayton stock.

IV

The law favors settlement of litigation; and in the absence of fraud practiced by appellees in its procurement, the stipulated judgment will not be set aside. —

F. C. Keane and other officers of appellant corporation were at least de facto officers; and in any event their authority cannot be attacked collaterally in this litigation. —

Moreover, appellant corporation's amended petition does not contain any allegation of fraud, lack of authority, lack of diligence or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, attorneys who (as well as F. C. Keane) represented appellant corporation in the litigation and signed the stipulation of judgment.

The record shows that the judgment now attacked is not for the full relief sought by appellees, but is based upon and pursuant to a compromise settlement entered into by appellees and appellant corporation (R. 2-33; 45-50).

The law favors the settlement of litigation and the compromise of disputed claims. *Clark v. Barlow*, 122 F. (2d) 337, 341 (App. D. C. 1941), cert. den. 314 U. S. 675. And, as the Supreme Court held in *Thompson v. Maxwell*, 95 U. S. 391, 397, 398, 24 L. Ed. 481 (1877), a bill of review will not lie where the decree was pursuant to a compromise settlement, in the absence of fraud in obtaining it. Regarding that rule, the court of appeals stated in *Walling v. Miller*, 138 F. (2d) 629, 631 (C. C. A. 8th 1943), cert. den. 321 U. S. 784:

“One reason for the rule is obvious. A court which, having jurisdiction of the parties and of the subject matter, renders a consent decree, if it sustains a motion of one of the parties to vacate such decree, not only sanctions the breach of a contract but in effect becomes a party to the breach.”

Appellant corporation's attack on the consent judgment is based in part on a contention and on allegations (mostly conclusions of law) that President F. C. Keane and other officers of appellant corporation acted as such without legal right or authority.

In the first sub-paragraph of paragraph VI of the amended petition (R. 66) appellant corporation collaterally attacks the authority of F. C. Keane and others who were president, officers and directors of the corporation in June 1946 and prior years. But in the first and subsequent sub-para-

graphs of paragraph VI, in paragraph VII (R. 70) and in the third sub-paragraph of paragraph X (R. 63) of the petition, as amended, appellant corporation alleges facts which clearly show that, from the commencement of this litigation to its compromise and settlement in June 1946, F. C. Keane was at least the de facto president of appellant corporation, and the other officers and directors of appellant corporation were at least de facto officers and directors, and that they were recognized as such by appellant corporation and its stockholders.

It is well settled law that F. C. Keane and the other persons acting as officers and directors of the defendant corporation at the time of the settlement of this action were at least de facto officers and directors, and that as such they had authority to represent the corporation with binding effect. Decided cases also make it clear that the authority of those officers can not be attacked collaterally in this litigation. — *Copper Belle Mining Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807, 810 (Ariz. 1909) — (directors of West Virginia corporation held to be de facto directors, even though not residents of West Virginia, as required by West Virginia statute); *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177, 180 (Calif. 1920) — (those exercising duties of corporate offices held de facto officers; and their lack of authority could not be questioned collaterally); *Consumer's Salt Co. v.*

Riggins, 208 Cal. 537, 282 Pac. 954, 955 (Calif. 1929) and *Farbstein v. Pacific Oil Tool Co.*, 127 Cal. A. 157, 15 P. (2d) 766, 769 (Calif. 1932) — (validity of election of corporate directors could not be questioned by corporate creditors, by the corporation, by stockholders of the corporation or by the directors themselves, in actions involving assessments on the corporate stock); *American Concrete Units Co. v. National Stone-Tile Corp.*, 115 Cal. A. 501, 1 P. (2d) 1084 (Calif. 1931) — (pending litigation re removal, removed officers continued to exercise duties of offices; and court held that, even after their removal, they were de facto officers and that their acts bound the corporation); *McKeehan v. Pacific Finance Corporation*, 120 Cal. A. 578, 8 P. (2d) 213, 215 (Calif. 1932) — (held that even though defendant lacked statutory qualification of being a stockholder he could be and was a de facto director).

It should be noted that in paragraph VI of its petition, as amended (R. 66-70), appellant corporation recognizes in part the validity of the dividend of Clayton stock which was declared by appellant corporation in September 1944, when its officers were F. C. Keane and others whose authority the appellant corporation now seeks to question in part.

It is elementary that appellant corporation is a corporate entity of continuing existence, and that

it can not repudiate its agreements or stipulations or other obligations upon a change of management.

As pointed out in *Fletcher Cyclopedia Corporations* (Perm. Ed.) Vol. 9, Sec. 4705, p. 578: "A default judgment is equally a bar with one rendered on a contest by the corporation, and includes all the facts confessed by the default." Even more is the appellant corporation barred in this case where the judgment was not merely a default judgment, but was one effecting a compromise and settlement to which the appellant corporation stipulated.

Appellant corporation's allegations that F. C. Keane abused his corporate office furnish no basis for disregarding the above quoted rule. As stated in *Fletcher Cyclopedia Corporations* (Perm. Ed.) Vol. 9, Sec. 4703, p. 574, with regard to vacating or setting aside of judgments against a corporation: "Neglect or delinquency of its own officers generally precludes relief, *except where fraud of the officer in connection with plaintiff is involved.*" (Italics added) The alleged misconduct of Keane might support an action by appellant corporation against Keane. But such allegations, especially when they include allegations that Keane, through Sekulic, used his misconduct and threats of further misconduct to induce appellees to accept a compromise settlement favorable to appellant corporation as well as to appellees, furnish no basis for relief against appellees. Nor do such allega-

tions go to Keane's authority as, at least, de facto president of the corporation.

Nahtel Corp. v. West Virginia Pulp & Paper Co., 141 F. (2d) 1, 3 (C. C. A. 2nd 1944), and *Arizona Southwest Bank v. Odam*, 38 Ariz. 394, 300 Pac. 195, 197 (Ariz. 1931) are to the effect that appellant corporation is estopped from litigating again the issues settled by the stipulated judgment, and is estopped from denying the authority of its former officers.

The second sub-paragraph of the amended paragraph VI (R. 66-67) merely adds allegations that appellant corporation on November 29, 1947, obtained certain affidavits from Messrs. Mullen and Evans. The contents of the affidavits are not alleged as facts, but even if they were, such allegations would not alter the situation. The amended petition would still contain the allegations that show de facto officers and estoppel of appellant corporation from denying their authority. — Of course, the allegations of conclusions of law, e.g., that Keane and the other officers "had no right or authority to act as such directors or officers" (R. 66), are not admitted by the motion to dismiss. *Green v. Brophy*, 110 F. (2d) 539, 544 (App. D. C. 1940); *Dixie Margarine Co. v. Schaefer*, 139 F. (2d) 221, 224 (C. C. A. 6th 1943).

The balance of the petition's amended paragraph VI (R. 67-70) shows that in the compromise settlement appellees received only 68% of the Clayton dividend for which they sued; that there was enough Clayton stock held by appellant corporation, at the time the dividend was declared, to pay all stockholders, including the appellees, on the declared basis of one share of Clayton to four of Independence; and that the 32% reduction in the Clayton dividend which appellees were persuaded to take in the settlement was a greater reduction than that allegedly suffered by the other common stockholders. Also, paragraph VI (R. 69) shows by implication, as this Court's judgment and decree specifically provides (R. 49), that in the compromise and settlement appellees suffered judgment that they surrender to appellant corporation 400,000 shares of the 1,000,000 shares of Class A common stock held by appellees.

In paragraph VIII of the petition, as amended (R. 61), it is alleged that Chas. E. Horning, acting as one of the attorneys for appellant corporation, was paid and received the sum of \$10,000.00 from appellant corporation for his services in the litigation which was concluded by the June 1946 judgment and decree. — It is very significant that nowhere in the original petition (R. 50-64) or the amendment to the petition (R. 65-76) does appellant corporation make any allegation of fraud, lack of authority, lack of diligence or unethical con-

duct on the part of either Chas. E. Horning or Eugene F. McCann who (as well as F. C. Keane) subscribed appellant corporation's April 1946 answer (R. 43), acted and signed for appellant corporation in the stipulation of settlement (R.47), and appeared before Judge Clark in connection with the judgment and decree (R. 48).

The amended petition does not and cannot remove the signatures of Chas. E. Horning and Eugene F. McCann from the stipulation of settlement of this case, dated June 22, 1946, and filed herein (R. 47). As shown by the record, those two attorneys as well as F. C. Keane were attorneys for appellant corporation from the time its answer was filed in April 1946. Their appearance in the litigation and their signatures on the stipulation pursuant to which this Court entered its judgment and decree on June 24, 1946, are at least a prima facie court record of their authority and of the good faith exercise of their professional judgment on behalf of appellant corporation. *Bowles v. American Brewery*, 146 F. (2d) 842, 847 (C. C. A. 4th 1945); *Liken v. Shaffer*, 64 F. Supp. 432, 449 (D. C., N. D. Iowa 1946). Neither in the original petition (R. 50-64) nor in the amendments to paragraphs VI and VII (R. 65-76) is there any allegation which attacks that prima facie court record.

A case that bears directly on the situation involved in this appeal is *Piccard v. Sperry Corpora-*

tion, 48 F. Supp, 465, 467, 469 (D. C., S. D. N. Y. 1943); aff'd., per curiam, 152 F. (2d) 462; cert. den. 328 U. S. 845. In that case the district court held that the corporation had "obtained a settlement which, in view of the difficult issue of fact and the uncertainty attending all litigation, is fair." It is particularly significant that in that case the claim of the corporation against one of its directors was for an amount of \$193,000; that the corporation settled that claim with the director for \$101,407.05; and that the District Court in the subsequent stockholders' derivative action against the other directors held that the \$193,000 claim was a good one. Nevertheless, the Court held further that the claim was uncertain when settled; that the directors acted in good faith; and that their business judgment exercised on behalf of the corporation at the time of the settlement was not subject to attack.

Moreover, the court in that case held that one of the defendant directors was not disqualified from voting on the settlement because he expected compensation in attorney's fees for negotiating the settlement.

The court there also held that a director was not disqualified from voting on the settlement because he was a stockholder in the other, adverse corporation—nor was he disqualified because his wife was a stockholder in the adverse corporation.

And the district court's decision in *Piccard v. Sperry Corp.*, 48 F. Supp. 465, was affirmed per curiam by the Circuit Court of Appeals, 152 F. (2d) 462, and the Supreme Court of the United States denied a petition for writ of certiorari, 328 U. S. 845.

In view of the holding in *Piccard v. Sperry Corp.*, and in view of appellant corporation's not raising any question as to the authority, integrity or professional judgment exercised in the compromise and settlement by appellant's attorney Chas. E. Horning and Eugene F. McCann, it is clear that the amended petition fails to allege a basis for vacating the judgment.

A petition to open, vacate or set aside a judgment is addressed to the sound legal discretion of the district court, and its determination of the matter is not disturbed on appeal except for a clear abuse of discretion. *Western Union Telegraph Co. v. Dismang*, 106 F. (2d) 362, 364 (C. C. A. 10th 1939); *Bush v. Bush*, 61 App. D. C. 357, 63 F. (2d) 134 (1933); *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 26 (C. C. A. 2nd 1915). — There was no abuse of discretion in the district court's dismissal of appellant corporation's amended petition, which does not allege any fraud practiced by appellees in procurement of the judgment, and which does not question the authority, good faith or diligence of attorneys Chas E. Horning and Eugene F. McCann who represented appellant corporation and stipulated the compromise settlement.

CONCLUSION

Appellant corporation can not avoid the controlling authorities which hold that the alleged fraud, set forth in appellant corporation's April 1946 answer, was made *res adjudicata* by the June 1946 stipulation and judgment.

Appellant corporation can not avoid the controlling authorities which hold that relief against a judgment for fraud will be granted only where the successful party practiced fraud in the procurement of the judgment.

Appellant corporation's amendment petition does not contain any allegation of fraud practiced by appellees, their attorney or anyone acting for appellees. — The amended petition's allegations of knowledge by appellees of F. C. Keane's misconduct do not constitute collusion or participation by appellees in such misconduct; and appellant corporation has not cited any authority which supports its contrary contention. — The amended petition does contain allegations which show that all community of interest, regarding the Clayton stock, between appellees and appellant corporation ended when appellant corporation declared the Clayton dividend and took a position antagonistic to appellees' interest in the dividend and antagonistic to the validity of appellees' Class A common stock

in appellant corporation. — Moreover, the amended petition alleges, regarding internal affairs of appellant corporation, that appellees received information and threats calculated to induce them to accept the compromise settlement which allegedly was proposed to appellees by one John Sekulich on a “this-or-nothing” basis. Thus, the amended petition comes closer to alleging coercion of appellees than it does to alleging fraud or connivance practiced by or on behalf of appellees.

The amended petition alleges facts which show that F. C. Keane and other officers of appellant corporation were at least *de facto* officers at the time of the compromise settlement; and in any event, the authority of those officers can not be attacked collaterally in this litigation.

Significantly, the amended petition does not question the authority, good faith or diligence of attorneys Chas. E. Horning and Eugene F. McCann who (as well as F. C. Keane) acted for appellant corporation in effecting the compromise settlement. And, settlement of litigation is favored by the courts.

In view of what appears in the record upon appeal and in view of the argument and the controlling authorities presented in this brief, it is manifest that the district court’s order dismissing the amended petition should be affirmed.

Respectfully submitted,

H. J. HULL

Wallace, Idaho

J. K. CHEADLE

Spokane, Washington

Attorneys for Appellees.

September 1948



IN THE

United States

Circuit Court of Appeals

NINTH CIRCUIT

INDEPENDENCE LEAD MINES COMPANY,
an Arizona Corporation,

Appellant,

VS.

ALMA R. KINGSBURY AND
OLGA MARQUARDT,

Appellees.

Reply Brief

*Upon Appeal from the District Court of the United
States for the District of Idaho, Northern Division*

FILED

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PAUL P. O'BRIEN,
CLERK

R. MAX ETTER,
WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.



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R. MAX ETTER,
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WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.

Appellees' brief is mindful of the quotation set out below, and employed by a member of the bar of this court many years ago, because it is a clear demonstration of the truth of Dryden's statement in the Prologue to "All For Love":

"Errors like straws, upon the surface flow;
He who would search for pearls, must dive
below."

The emphasis in appellees' brief is carefully restricted in its consideration of this case to those parts of the controversy which the appellees detach from the entire narrative of the events alleged in appellant's amended petition, and construe most favorably to themselves, in disregard of the legal principles applicable to the whole. The method of argument is reminiscent of the undue emphasis many times placed upon a word, a phrase, or a paragraph, which has been separated from the meaning indicated by the whole context from which it is selected, for the purpose of lending substance to that method of argument.

In order that the court may be afforded a chronological reply to the brief of appellees, this brief will reply to the appellees' order of discussion set forth in their briefs.

I.

In the appellees' statement of the case there is indulged the presumption that appellant's statement of the case submits matters as appellees say "which were

adjudicated in the same case * * *” (Appellees’ Brief, page 1).

The appellees further say the failure by appellants to discuss the fact that F. C. Keane was only one of the lawyers for appellant and that there were two other counsel, namely, Chas. E. Horning and Eugene F. McCann, is a signal factor in the shroud of regularity which must be conceded to appellees’ activities. In the first place appellant does not concede, and has never conceded, the regularity or legality of *any of the proceedings* leading up to the stipulated judgment whereby F. C. Keane, the defalcating president of the appellant, generously awarded the appellees all of the Clayton Silver Mines stock held by the appellant for the benefit of its assessable stockholders, without a contest of any kind, and in a collusive, conniving fashion. The appellant in this case has always contended that all of the fraud involved in this action was material and was not cut off by the collusive stipulated judgment; the appellant was not estopped by the stipulated collusive judgment between appellant and appellees. Appellant instituted its action for the express purpose of reopening and setting aside the collusive judgment, and has therefore made an issue of *the entire fraud perpetrated on the corporation* which culminated in the collusive judgment. That judgment, in fact, which was uncontested, was a complete “sell-out” by the appellant’s officers to the appellees, who well knew all of the conditions that existed within the appellant corporation, and who took advantage of that knowledge to secure the judgment without any trial

of the issues which were involved. If the appellant corporation failed to make an issue of the sleight of hand stock manipulations, which led up to its motion or petition to reopen the judgment, it would be lax in its duty to the assessable stockholders. It seeks to recover not only the Clayton Silver Mines trustee stock, which appellees have taken unto themselves by virtue of the collusive judgment, but it also must, of necessity, eliminate the ever-present shadow of the domination by a million shares of non-assessable stock, claimed by the appellees, of the appellant corporation's affairs. This so-called common stock Class A, by virtue of the stipulated judgment secured by the appellees, will deprive the common assessable stockholders of their proper voice in the corporation's affairs and will further devalue their stock, as it already has done, because of its failure at any time to assume the necessary expenses of assessment by the appellant corporation; nor will it be liable for any financial assistance required by the appellant in the future. That stock, as we have shown, has been received by the appellees without any consideration whatsoever moving to the appellant corporation; this all in fraud of the representations previously made by the officers of the corporation, who were the husbands and predecessors in interest of the appellees. (Op. Brief Appellants, pages 35-42, inc.; Tr. pages 51-58, inc.) We believe the consideration of these facts is pertinent. In our opinion, the appellees' argument concerning the association of other counsel by F. C. Keane, the president of the appellant, at the time of the stipulated

judgment, requires no answer. F. C. Keane knew the position that he was in and it is unlikely that he would lay himself open by acting independently. We do not believe that in view of his activities, *which the record discloses he has never denied*, that he could clothe his activities, or the activities of the corporation at the time he was president, with an aura of respectability or regularity, by the association of Mr. Horning and Mr. McCann, the latter being the law partner of Mr. F. C. Keane.

II.

It is conceded that ordinarily fraud which was at issue, or which could have been dealt with in litigation concluded by a judgment, cannot be made the basis of an attack on the judgment. However, the facts in the case in issue indicate that the rule is inapplicable here. In the present instance, the fraud which *should have been made an issue* (Tr. pages 39-41, inc.), could not be, and was not dealt with in the proceedings leading up to the collusive judgment, because the collusion between the president of the appellant corporation and appellees, *prevented its litigation*. The effect, of course, was that the fraud was not litigated. The fact remains plain, that there has been no real contest, or contests of any kind in this matter, and there is thus no merit in the contention of appellees, that the collusive judgment is now *res adjudicata*.

“Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or

deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; *or where the attorney regularly employed corruptly sells out his Client's interest to the other side*—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.” *United States vs. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, page 95. (Emphasis supplied.)

Neither of the cases cited by appellees (pages 8 and 9, Appellees' Brief), to-wit, *Toledo Co. vs. Computing Co.* and *Brady vs. Beams*, is on all fours with the issues before this court. In the *Brady vs. Beams* case the facts clearly indicate that the fraud alleged had been discovered *before the judgment, and not after, and that case is therefore not in point.* However, it might be observed that *the fraud in this case was certainly known and discovered and actively aided by the appellees before they entered into the stipulated judgment with the appellant.* As early as July, 1945, the appellees, well knowing what Mr. Keane, the president of appellant corporation, was doing in the way of dissipating the trust stock owned by the appellant, caused notice to be given to the Clayton Silver Mines Company, in writing, to stop the transfers of Clayton stock and threatened an injunction to enforce the

notice. (Op. Brief Appellants, pages 48, 49; Tr. pages 72, 73.) The *Toledo Co. vs. Computing Co.* case is likewise not in point with the present case. In that case the court held *that there was an absence of due diligence*. No contention is made by appellees against appellant's petition on that ground.

III.

Appellees argue the position that appellant is not entitled to any relief against the collusive judgment attacked by the appellant, because appellees have not participated in fraud or connived in the procurement of the judgment. We submit that appellees have in fact connived to procure the judgment, and furthermore, that their fraud and connivance by reason of their knowledge and succession in interest, extends all the way back to the point where their husbands who controlled the appellant corporation took to themselves, fraudulently, and without consideration, the entire one million shares of common stock Class A. The appellees have derived thereby the benefits of all of the remaining trust fund shares of the Clayton Silver Mines stock owned by the appellant corporation. Appellees should not now be allowed, in equity and fairness, to separate themselves in any sense from the continuing scheme, and the continuing fraud, practiced upon the appellant corporation. The million shares of common stock Class A has been, was, and now is, a fraudulent issue. Its circumstantial change of ownership is attended by all of the deficiencies which attached to it from the very time it was surreptitiously

taken from the corporation without any consideration, and in contravention of express representations made to the stockholders. (Tr. page 52.)

Furthermore, these appellees have had knowledge at all times of the character of the common stock Class A. They have been in a position to know the character of that stock. They have known of the defalcations of the president of the appellant corporation. They knew of the defalcations and they actively sought to prevent any further transfers of the stock, not for the purpose of aiding or assisting the appellant corporation, or for the purpose of keeping the appellant corporation a liquid operating entity, but for the purpose of securing to themselves the entire corporate holdings of the trust fund stock. The appellees likewise negotiated surreptitiously with the emissary of the president, of the appellant corporation, one John Sekulic. In view of these circumstances, it is impossible to construe these facts favorably to the position taken by the appellees, and it really is a strain on credulity to gratuitously assume, as appellees do, that they have not participated or connived at fraud within the meaning of the term. Appellees take the position that because they did not originally instigate a continuing fraud, they could in no wise be charged with it, regardless of their obvious collusion and connivance. Such a conclusion is not sustained in the law. Webster defines connivance to mean:

“to shut the eyes; to feign ignorance; to pretend not to look; to cooperate secretly, or to have a secret understanding.”

The appellees had actual notice of the frauds involved and they participated in them. They did not take the proper action, which certain stockholders of the corporation took, when those stockholders dug out the facts of the defalcation of the president of the appellant corporation; they did not institute an action for receivership for the benefit of the corporation and its stockholders (Tr. pages 82-101, inc.); and yet, as the amended petition seeking to reopen the judgment alleges, they knew the facts which were set up in the complaint for receivership relating to the defalcations of F. C. Keane, the president of the appellant corporation. We submit that the facts in issue before this court are supported in every way by the case submitted in appellant's opening brief, to-wit, *Whitney vs. Hazzard*, 18 S. D. 490, 101 N. W. 346. (See Op. Brief, pages 26, 27, 28; Appellees' Brief, page 14).

IV.

Appellees' discussion under their Title III shows the plucking by them of statements from the context of an authoritative work on corporations, which are not the rules applicable to the situation presented in this case. For instance, the statement of appellees (Appellees' Brief, page 19) that, "a stockholder is not bound to the strict rule as to knowledge of the affairs of a corporation that applies to directors and officers," is obviously incomplete. The petition to reopen the cause alleges, and the motion to dismiss of the appellees admits, *that the appellees actually did have knowledge of the affairs of the corporation*. There

certainly did not exist, at the time of the declaration by the appellant corporation of its stock dividend to its non-assessable stockholders, any community of interest with appellees. No community of interest existed which could be put at an end by the dividend resolution of the appellant. Appellees apparently assume that the stipulated collusive judgment, which impressed the common stock Class A with legality, now acts retroactively to sustain their argument that a community of interest existed between appellees and appellant, which ended with the refusal of the appellant to distribute dividend stock to the appellees, who were never legally entitled to it. The tenuous argument advanced by appellees, is analogous to a situation where an alleged creditor of a corporation in a spurious legal action connives with the president of the corporation to secure a stipulated judgment and pecuniary benefits to the alleged creditor, though the alleged creditor had no cause of action. Furthermore, the argument of appellees seeking to prove that they did not have a dominating "control" of the appellant in the sense alleged by the appellant, is quite without substance. The assertion of appellees that they had only twenty-five per cent of the stock in the appellant corporation is not the fair picture. As the appellant alleged in its amended petition to reopen, the truth of the matter is, "that the said plaintiffs prior to and during the litigation herein have claimed to be by many times the largest stockholders of the Independence Lead Mines Company * * *." (Tr. P. 71.)

The appellant should be allowed to go to trial on the merits, to prove the correctness of this allegation, because the appellees by their motion to dismiss have already admitted the same. Furthermore, the claim made in respect to appellees' ownership of only twenty-five per cent of the stock is quite unfair in view of the fact that there is no statement in connection therewith that appellees did not own, at the time of this controversy, any other shares of the appellant's stock in addition to the common stock Class A. Appellees cannot make the positive statement that they did not own a sizable block of stock of the corporation, in addition to the common stock Class A, at the time of the original litigation in this case. Of course, all through appellees' argument we find the matter of "control" confined to stock ownership alone, and no consideration is given by appellees to other factors involved in "control." No mention is made of the relation of the predecessors in interest of appellees to the corporation, who were in control of the appellant as its officers during most of the corporate existence, and who put the wheels in motion for the fraud and continuing fraud, which was joined by appellees, in their collaboration and participation.

Appellees contend, rather weakly, that the activities of John Sekulic on behalf of F. C. Keane constituted coercion, rather than collusion and connivance with appellees. Obviously, the appellees were not coerced in July of 1945 when they threatened to enjoin the Clayton Silver Mines Company from transferring any

more of the stock which F. C. Keane, the defalcating president of the appellant corporation, was selling for his own use and benefit. Furthermore, it is almost axiomatic, that a case for equitable relief against a judgment exists in a situation where the judgment is entered for the purpose of defrauding third persons; and it is certainly known that this rule prevails where a judgment creditor and a judgment debtor conspire or collude to defraud the creditors of the latter. In this case, at the time of the entry of the collusive stipulated judgment, it had not been judicially determined that the appellant corporation had deteriorated in financial status to the position that it was almost bankrupt; but it was a fact, known by the appellees, that there were serious financial disabilities in the appellant corporation.

Cases are legion in which a creditor and debtor settle claims to their own advantage in attempts to defraud third parties, who have equal claims, and the bankruptcy law itself recognizes the possibility of attempts being made by the bankrupt to prefer a creditor or class of creditors. Therefore, prohibitions against such acts are written into that law. Likewise it is hard for us to conceive that the appellees, or their able counsel, could have been in any way coerced by Mr. Keane or Mr. Sekulic. It would appear from the appellees' amended complaint (see Op. Brief, page 29; Tr. pages 44, 45), and the stipulated judgment, that appellees were "willingly" coerced, and substantially rewarded, in the cause against appellant corporation.

Appellees' remaining argument is directed principally to the proposition that Keane and other officers of the appellant corporation were at least *de facto* officers, and the appellees in support of that proposition state at page 34 of their brief:

“Of course, the allegations of conclusions of law, e. g., that Keane and the other officers ‘had no right or authority to act as such directors or officers’ (R. 66), are not admitted by the motion to dismiss.”

Appellees, in posing their argument as above, have sought to build a straw-man and then to knock it down. We might add that paragraph VII (Tr. pages 70, 71; Op. Brief, pages 46, 47) states as follows:

“And the said plaintiffs, well knowing that no stockholders’ meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by said Keane was illegal and void.” (Emphasis supplied.)

This allegation is not a conclusion of law. It is a statement that the appellees had knowledge of all of those things set forth and alleged in the preceding paragraph, to-wit, paragraph VI of the petition to reopen. Appellees pointedly avoid any reference to this part of the petition. An examination of the cases

cited in support of appellees' *de facto* argument lends no support to appellees' argument (Brief of Appellees, pages 31, 32):

- a. (Copper Belle Mining Co. case)—In this case the facts indicate that the directors had been elected by the stockholders without objection and were therefore *de facto* stockholders.
- b. (Guaranty Loan Co. case)—This case held that the officers were *de facto* officers even though the election of the board may have been invalidated for lack of proper notice.
- c. (Consumer's Salt Co. case)—This case held that though there was a dispute over the right of a majority of stockholders to vote, nevertheless the directors when elected became *de facto* directors.
- d. (Farbstein case)—This case held that the validity of the board of directors could not be questioned in a case involving a challenge to a stock assessment.
- e. (American Concrete Units Co. case)—This case held that even though the directors had not been re-elected at the meeting, yet they had been requested to continue to act as directors by the corporation.
- f. (McKeehan case)—This case is authority for the statement that a non-stockholder could be a *de facto* director where he was elected.

The further argument of appellees, in support of the proposition that the appellant corporation can not repudiate its agreements or stipulations, *is not grounded on a situation where fraud and collusion are patent*

throughout the entire proceedings leading up to a stipulated judgment. The appellees here have engaged in connivance and collusion *to effectuate profitably*, the plan, connivance, collusion and fraud, of their predecessors in interest. Appellees' whole argument throughout the brief is bottomed on the gratuitous premise, that there was not a continuing fraud throughout, and in our opinion their brief, being wrongly premised, is unsupported by the law applicable.

The case likewise suggested by appellees, and claimed by them to bear directly on the situation involved in this appeal, to wit, *Piccard vs. Sperry Corporation* (see Appellees' Brief, pages 36, 37), is not in point as to fact or to law. In that case the issues were made in a challenge by a stockholder of the corporation against the corporation on two grounds. *It suffices to say that neither of the grounds complained of in the action referred to consisted of fraud.* One of the challenges was made on the bona fides of a settlement. The court said in that case:

“This alone fails them, however, for I find the transaction was attended on the part of the directors by *good faith, sound business judgment and prudent solicitude for the welfare of the corporation.*” (Emphasis supplied.)

Applying the language above, in relation to the allegations of the petition to reopen, *it cannot be said that the determining factors of the bona fides in this dispute are in any way, shape or form comparable to those emphasized above.* There was in this case no

good faith, no sound business judgment, and no prudent solicitude for the welfare of the corporation on behalf of either appellees, acting with knowledge that F. C. Keane was not competent legally to stipulate a judgment, or F. C. Keane acting without any authority whatsoever.

CONCLUSION

1. The amended petition contains direct and undenied allegations of connivance and fraud, practiced by appellees and their predecessors, and the petition alleges an active participation and connivance in a fraudulent judgment secured by the appellees for their own exclusive benefit. There is present, fraud, and a suppression and exclusion of the equitable rights of the appellant and its assessable stockholders.

2. At this stage in the proceedings there is nothing before the court to justify the gratuitous statement that the compromise settlement was favorable to the appellant or was as favorable to the appellant as it was to the appellees.

3. The allegations of the petition eliminate any consideration of appellees' argument that they dealt with any *de jure* or *de facto* directors of appellant corporation. It is in fact affirmatively alleged in the amended petition, that the plaintiffs knew that F. C. Keane and the officers of the company were not legal officers, and could not act in accordance with law on behalf of the corporation in any dealings with ap-

pellees. True, the directors could have been *de facto* directors in dealings with other persons or stockholders, if those persons or stockholders had no knowledge that Keane and the directors were not legal directors. That situation is not present here.

4. The president of appellant corporation, F. C. Keane, acted illegally and dissipated practically all of the corporate assets. His actions were in disregard of the rights of assessable stockholders, who have for many years paid assessments on their stock through good times and bad, to keep the appellant corporation in business. F. C. Keane acted illegally as appellant corporation's president, and while so acting, he sought to protect and save himself by resort to a collusive stipulated judgment and fraudulent compromise.

5. Appellees here dealt with Keane as a director and an officer of the corporation, knowing full well that he was legally incapable of acting in such capacity, and they dealt with him directly and through his emissary, as the attorney for the appellant corporation, with knowledge of his activities as set forth above. They were knowingly parties to a collusive stipulated judgment and fraudulent compromise, and they actively participated and connived with Keane in his dual capacity as the attorney for the appellant corporation protecting Keane, and as Keane the defalcating officer. The appellees have actively lent aid and sustenance to Keane, and have deliberately, and with knowledge of the facts, helped themselves to the remaining assets of the trust stock of the appellant

corporation. Appellees well knew, that by so doing, they were depriving all other stockholders of any participation in the stock dividend of the appellant declared to them. The judgment of the District Court should be reversed.

Respectfully submitted,

R. MAX ETTER,
WILLIAM E. CULLEN,
WALTER H. HANSON,
Attorneys for Appellant.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

INDEPENDENCE LEAD MINES COMPANY,
an Arizona Corporation,

Appellant,

vs.

ALMA R. KINGSBURY AND
OLGA MARQUARDT,

Appellees.

PETITION FOR REHEARING EN BANC

*Upon Appeal from the District Court of the
United States for the District of Idaho,
Northern Division*

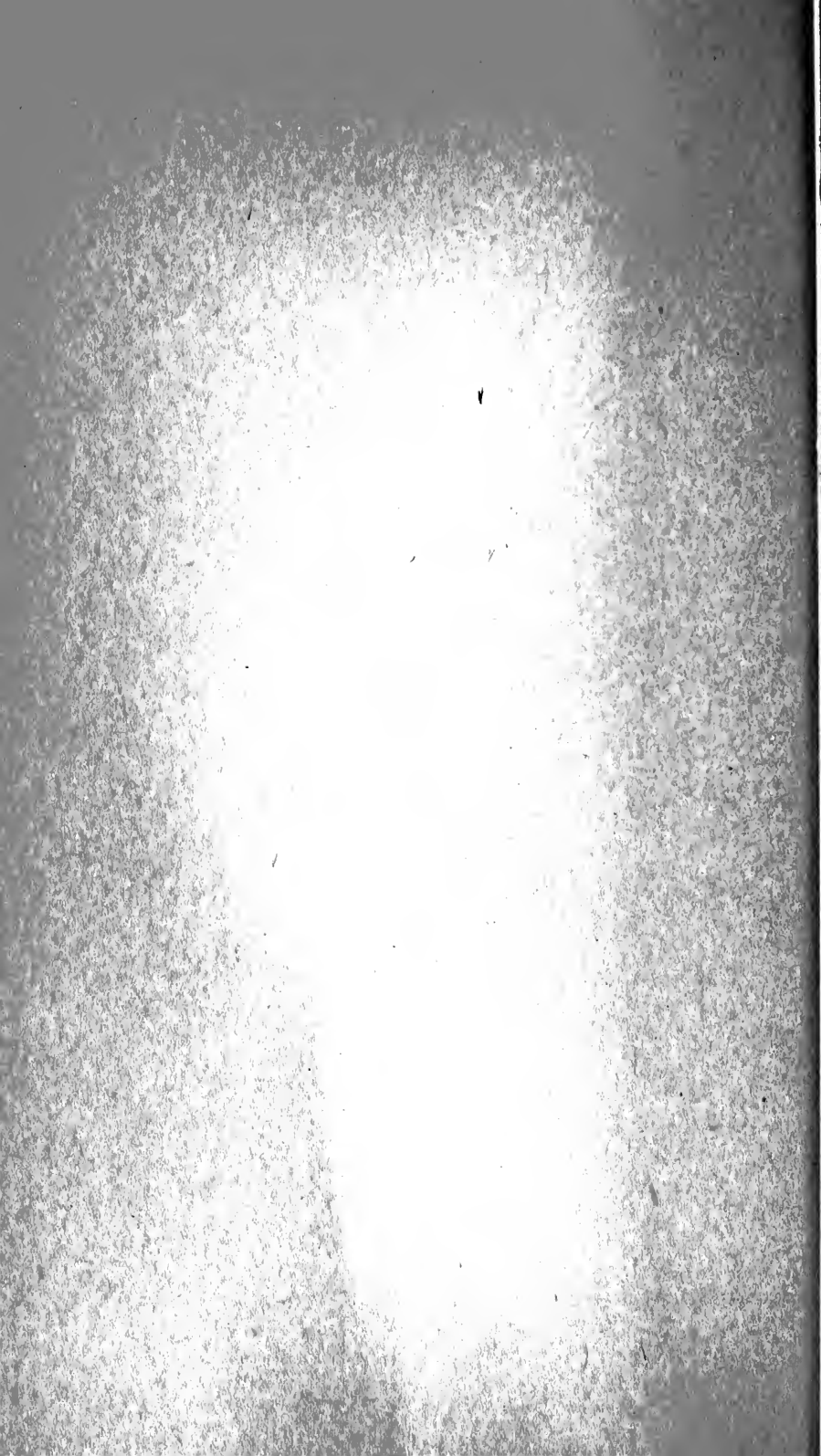
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PAUL P. O'BRIEN,
CLERK

R. MAX ETTER,
WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.



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R. MAX ETTER,
WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Appellant.



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PETITION FOR REHEARING EN BANC

Appellant respectfully prays that this cause be reheard and reconsidered en banc, and prays for a reconsideration of the opinion filed herein February 28, 1949, by reason of the dissenting opinion likewise filed herein, and because of the following points in which the appellant believes that the court fell into substantial and serious error on the legal and factual issues involved and presented by appellant in this cause:

I.

The court erred in holding that the fraud charged and complained of in the petition was made an issue in the litigation and was concluded by the stipulated judgment against the appellant prior to the filing of the petition for vacating said judgment.

The record in this cause, and particularly the undisputed allegations of fact in the appellant's petition to reopen and vacate the judgment, indicate, in our opinion, that there never was a litigation of any issue between appellant and appellees which in law or equity could sustain the then president of the appellant, F. C. Keane, in generously handing over to the appellees every last single share of Clayton stock held in the treasury of the appellant and including all of the trust stock held for the benefit of common stockholders by reason of a dividend previously declared to them. It must be conceded that it was quite a considerable time after appellees commenced an action to compel the payment to them of dividend Clayton stock by the appellant (Tr. page 2, et seq.), that appellant's president, F. C. Keane, who was then acting illegally as president of the appellant corporation, filed any answer in the cause (Tr. pages 38-43, incl.). It appears that Keane, who was then acting as president of the appellant corporation, made no answer of any kind going to the merits of appellees' complaint until *almost one whole year had expired from the date of filing the complaint*. Within two months after Keane, illegally acting as president of the corporation, filed an answer in the cause, appellees amended their complaint (Tr. page 43), entered into a stipulation with Keane and appellant corporation (Tr. page 45), and entered a stipulated judgment against the appellant (Tr. page 48).

Within one month after appellees commenced their

action in June of 1945, they caused notice in writing to be sent to the Clayton Silver Mines Company and its officers at its office in Wallace, Idaho, to stop forthwith all further transfers of Clayton stock belonging to the Independence Lead Mines Company; and appellees threatened that if said Clayton Silver Mines Company did not comply with said notice, they, the appellees, would immediately bring injunction proceedings to prevent any further disposition or transfer of such stock (Tr. pages 72, 73). The record indicates that there were no further sales of Clayton Silver Mines stock by F. C. Keane for the personal account of F. C. Keane, who was acting as president, or at all, *after the year 1945* (Tr. pages 97, 98, 99, 100). We think it obvious that appellees' notice to Clayton Silver Mines Company was definitely effective; that the Clayton Silver Mines Company did heed the notice; and that Keane was likewise informed or had knowledge of said notice and threat; because it does not appear that Keane made any further sales or transfers after the notice given in July of 1945 even though the appellant company still had in its treasury at the time of appellees' notice and threat of injunction the sum of approximately 170,000 *Clayton shares*. (In connection with the above, see Note 5, majority opinion, and reference Note 7, dissenting opinion.)

The record further discloses that all of these remaining 170,000 shares were retained by Keane until they were awarded to appellees here by stipulated judgment of appellees and the then acting president,

Keane. Keane at the time of appellees' notice and threat of injunction directed toward Clayton Silver Mines had misappropriated 218,000 shares of Clayton Silver Mines Company stock held and owned by appellant corporation, and it does not appear that after appellees' notice and threat a single share was further disposed of. Appellees got the balance. (In this connection, likewise see table and breakdown of Clayton stock held by Independence, in dissenting opinion.)

Keeping the above facts in mind, we turn to the appellant's petition to vacate the judgment, entered on behalf of appellees with Keane, the defalcating alleged president of appellant. Such petition has already been the subject of discussion in the opinion of this court, and in the dissent. However, it is most important to point out that in analyzing the sequence of events related above, and keeping them in mind at all times along with the implications logically deducible from them, we find that the petition alleges that *appellees knew all about Keane's misappropriations* and dissipation of the company assets; that they knew the stipulated judgment entered into between them and Keane and the appellant would give them stock of other common stockholders already impressed with a trust character; and that they were definitely told by one John Sekulic, an emissary of the defalcating alleged president Keane, of all the facts and circumstances of the appellant corporation's situation and Keane's defalcations before they took the Clayton stock by the collusive judgment (Tr. pages 73, 74, et

seq.; Appendix pages 49, 50, 51, appellant's opening brief).

It therefore appears upon the undisputed facts in the petition, the truth of which are admitted by appellees' motion to dismiss directed against appellant's petition to reopen and vacate, that none of the fraud alleged in the petition to reopen and vacate was ever in issue or was ever litigated or concluded by the judgment in favor of the appellees. It would appear rather that the fraud and collusion determined the judgment and actively and positively prevented any proper real contest of any issues between the appellees and appellant. Therefore, inasmuch as the petition to reopen directly alleges by facts pleaded the participation of the appellees with the appellant in the fraud, the appellees, by reason of such participation, prevented any real contest or litigation on the merits of the controversy existing between appellees and appellant.

II.

The court erred in holding that Keane and the other directors were at least de facto officers in their relations with appellees.

The majority opinion in this case states as follows:

“The petition avers that since the death of Marquardt in 1942 Independence had been under the control and domination of one Keane, its acting president; that Keane was currently disqualified to act as an officer because no longer a stock-

holder; and that the two other directors serving with and appointed by Keane were not stockholders, hence were also disqualified from acting. No stockholders meeting, it is said, had been held for eight years. It is averred that appellees, well knowing these facts, dealt with Keane in the settlement of their suit. *From the recitals of the petition as a whole, however, it is plain that Keane and the other directors were at least de facto officers.* Cf. Fletcher, Cyc. Corp., Vol. 2, Ch. 11, paragraphs 372-390. Keane was and for years had been in open and unchallenged possession of the office, discharging its duties under color of authority and with the acquiescence of the generality of stockholders. The latter appear to have recognized his authority to act for the corporation; and there is no allegation that they themselves were unaware of the true nature or infirmities of his tenure. The very dividend from which this litigation stemmed had been declared and was in process of distribution by Keane and his associates acting as officers and directors. The common stockholders had sought the dividend at their hands, recognized their authority to declare it, and claimed and accepted its fruits. We think Independence, speaking here ostensibly for the common stockholders, is in no position to challenge Keane's official status." (Italics supplied.)

It appears from the above that the court approves the position taken by appellees in their brief (see appellees' brief, pages 29-32, incl.) and it holds, furthermore, that the Independence Lead Mines Company speaking for and on behalf of the common stockholders is in no position to challenge Keane's official status. It can be conceded that generally many of the common stockholders were under the impression that Keane

was the legally elected president of the appellant corporation; and that Keane discharged his duties under color of authority and with the acquiescence of many of the stockholders. However, the record indicates that defendant Keane had not been entirely in open and unchallenged possession of the office (Tr. page 86).

Assuming, however, the majority opinion's statement as it respected Keane's relationship to many of the stockholders, it does not follow that appellees here who dealt with Keane, *knowing in fact that he was not even an officer de jure of the appellant corporation*, are free from liability to appellant corporation and its common stockholders for the Clayton Silver Mines Company stock and money which they received from the corporation as a result of a collusive, fraudulent, stipulated judgment.

The reason for the de facto doctrine has been stated as follows:

“The reason for the rule was also well stated by Justice Clopton in Alabama as follows: ‘The doctrine of the validity of the acts of officers de facto rests on public policy and justice. The official dealings of directors de facto with third persons are sustained as rightful and valid, on the ground of continuous acquiescence by the corporation, and suffering them to hold themselves out as having such authority; *thereby inducing others to deal with them in such capacity*. The theory of the doctrine of officers de facto, and the principles sustaining the validity of their official acts, are that, though wrongfully in office, yet exercising power and functions appertaining

to such office, *justice and necessity require, for the protection and preservation of the rights and interests of third persons, that their acts, within the scope of official authority and duty, shall be sustained.*'' (Italics supplied.) (*Fletcher Encyclopedia Corporations, Perm. Ed., Vol. 2, Sec. 384, page 163.*)

It seems clear from the above that if the stockholders of a corporation, or the corporation by acquiescence allows officers to act and to deal with third persons, then the official dealings of those officers *de facto* are rightful and valid—if, *however*, such conduct of the corporation in its acquiescence *thereby induces others to deal with them in that capacity. That situation is not present here.* The petition to vacate the judgment alleges as facts admitted by appellees' motion to dismiss, that neither F. C. Keane nor two other so-called directors were in fact lawful directors of the appellant corporation (Tr. page 58); and the petition further alleges that appellees well knew these facts and well knew that there was no legal board of directors—the appellees in fact knew that neither F. C. Keane nor the others were *de jure* officers (Tr. pages 61, 70, 71, 85). There was no question of appellees being misled by Keane, the appellant, or appellant's stockholders, and there is no question involved concerning the protection of their rights, if any, as innocent third parties.

The rule applicable to appellees is as follows:

“Exception where person dealing with officers not misled. The de facto rule will not be extended

to a case where a person dealing with alleged corporate officers is not misled, nor induced to believe that he is dealing with legal officers, but has knowledge that the person pretending to be an officer is not a de jure officer." (*Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 2, Sec. 385, page 163.*)

A Washington case cited to the text, namely, *Grove and Improvement Company vs. Farmers' Supply Company*, 25 Wash. 344-346, 65 Pac. 529, states in part as follows:

"The rule that third persons dealing with de facto officers of a corporation are protected in such dealings has no application. *The rule is designed for the protection of innocent third persons, who have dealt with such officers without knowledge of their true character.* But here the evidence offered tended to show that the manager of the respondent, who represented it in the making of the lease, was one of the persons intruding into the offices of the corporation which purported to execute the lease; and, as he had knowledge of the lack of authority of the intruders to represent the corporation, his knowledge must be imputed to the respondent." (*Italics supplied.*)

Also, it has been stated as follows:

"(4) But different considerations arise when the protection of third parties is not involved. A person clothed with apparent authority may be a de facto officer to the general public and to innocent third persons, but not such where his own rights are involved, *nor to those fully advised of his status*, nor as against one showing a prima facie right to an office he unlawfully withholds."

(*Carpenter vs. Clark*, 217 Mich. 63, 185 N. W. 868, 870.) (Italics supplied.)

The discussion and authority cited above determines that appellees did not acquire any right in the capacity of innocent parties that would clothe them with immunity from the present action of the appellant corporation, by reason of any dealings with de facto officers. Surely this appellant corporation has a right to prove, if it can, that the appellees dealt with individuals whom appellees knew had no legal right, or any right at all, to represent the appellant corporation.

III.

The court erred in holding that Keane's anxiety to prevent exposure was not a moving factor which induced the settlement.

We are obliged to assume, in view of the court's language (majority opinion), that it has held that Keane was re-acquiring substantial amounts of Clayton stock and that he made a public disclosure of the internal affairs of the Independence Lead Mines Company of his own irregularities as president. We feel obliged to assume also that the court is of the opinion that such disclosure by Keane was in the nature of a voluntary disclosure. The opinion of the court refers to the audit of the Independence Lead Mines Company in support of the above. In that connection, it is important to note the language in the petition of appellant set forth at page 89 of the transcript. (Reference is made to this complete proceeding (L. J. Hop-

ins and W. E. Cullen vs. Independence Lead Mines Company), and the same is included by reference in the petition of appellant to vacate the judgment. See Tr. Page 61. Also see Tr. page 76.) The allegation to which reference is made, in the interest of convenience is set out herewith:

“XIV. For a long period of time the said Independence Lead Mines Company, and more particularly its President, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington, and the rules and regulations of the Spokane Stock Exchange of Spokane, Washington, and the Secretary of the Securities and Exchange Commission *threatened to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit made by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as President of the Independence Lead Mines Company and by William Mullen, as Secretary of the said company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company.*” (Italics supplied.)

It is likewise of interest to note that while the liti-

gation was pending between appellees and F. C. Keane and the appellant corporation in the years 1945 and 1946, that F. C. Keane made no disclosure of his own irregularities or of the internal affairs of the Independence Lead Mines Company for those years by the required reports to the Securities and Exchange Commission; the only disclosure Keane made was the surreptitious disclosure to the appellees shortly prior to the time that they secured their stipulated judgment against appellant corporation. It is our considered opinion that the one and only reason for the filing of the report by F. C. Keane in the year 1947 was the threat of the Securities and Exchange Commission to withdraw the Independence Lead Mines Company stock from trading. That action of the Commission would, of course, have exploded the affairs of F. C. Keane and the Independence Lead Mines Company in a more abrupt and resounding fashion than was possible by the institution of the receivership suit (Tr. page 82, et seq.). The above likewise indicates the direct relevancy of Keane's mismanagement and misdeeds to the acts of appellees, who, with knowledge of those facts, employed them in their own interest to prevent any trial of any issue then existing between appellees and appellant corporation. Likewise we submit to this Honorable Court that it would be almost impossible to prove direct threats against Keane, but the circumstances involved herein, when considered as a whole with all reasonable deductions and inferences from such circumstances, logically display the whole picture of the collusive judgment entered against

he appellant corporation. (Likewise in this regard see Section IV below.)

IV.

The court erred in holding that there was no collusion or connivance engaged in by the appellees.

The court refers in its opinion to Restatement of the Law of Judgments, Section 122, comment 'e'. The latter part of the comment (see page 597, Restatement of the Law of Judgments) is as follows:

“Duress has the same effect as collusion and is similar to it. It differs from collusion only in that there is a threat of a disagreeable alternative to the fiduciary if he does not act in violation of duty to the beneficiary instead of a benefit conferred upon or promised to him for such action.” (Italics supplied.)

In view of the above, and keeping in mind the definition of 'connivance' (see appellant's reply brief, page 8), we suggest that duress and collusion were present, and are properly pleaded by appellant in the petition to vacate; and that such acts, charged as having been employed by appellees, are admitted by appellees' motion to dismiss. It must be remembered that appellees by stipulated judgment settled with appellant corporation, through Keane, and received from it, through Keane, all of its shares of Clayton Silver Mines Company stock, besides a sizeable amount of cash, in June of the year 1946 (Tr. pages 48, 49, 50), although prior to that time appellees knew by reason of the visit from Mr. Keane's emissary, John Sekulic

(Tr. pages 73, 74, 75), that Keane had misappropriated and taken unto himself 218,000 shares of Clayton Silver Mines Company stock belonging to the appellant corporation and its stockholders, including both of the appellees. Despite the knowledge of the misappropriations of Keane which were brought to the attention of the appellees prior to the stipulated judgment entered into with them by the appellant and with Keane, *they did nothing but take all of the balance of the Clayton Silver Mines Company stock remaining in the corporation treasury; they did not expose Keane; they did not investigate Keane; they did not call for a stockholders meeting; they did not try to remove Keane; they did not report their knowledge to any officer of the law or State's attorney; they did not take any step against Keane that would be consistent with the usual, ordinary action which would be taken by any stockholder against an officer of his corporation, who such stockholder knew to be corrupt, and who such stockholder knew had misappropriated practically all of the assets of the corporation for his own benefit.* Surely with this in mind, the only possible logical deduction to assume therefrom is *that appellees made no complaint or report of any kind, nor took any action of any kind, because of the payment to them in the stipulated judgment by Keane of the balance of all Clayton Silver Mines Company stock remaining in appellant corporation's treasury.* Duress of Keane seems apparent, for the facts indicate that after the settlement was made, no action of any kind was taken by these appellees, despite their knowledge of Keane's

deeds, and it remained for the Securities and Exchange Commission to compel the disclosure of Keane's misdeeds to the other stockholders. No disclosure whatsoever was made or attempted by appellees who had knowledge of the misdeeds and who profited in the settlement. Likewise, pertinent rules and important observations are made in respect to the above situation, in the following: Restatement of the Law of Judgments—Section 122, comment 'a', page 593; comment 'b', page 594, the latter part thereof which is as follows:

“Likewise a person who has been harmed by a judgment obtained as the result of collusion between his representative and the representative of the other party is entitled to equitable relief upon discovery of the facts if other methods of relief are not then available.”

Paragraph 'c' and illustrations, page 595; and paragraph 'd', page 596.

V.

The court likewise erred in not finding:

(a) That there is an obligation upon appellees to return the fruits of the stipulated judgment which they collusively acquired (see dissenting opinion);

(b) That appellees were in trustee relationship toward the stockholders entitled to the dividend (see dissenting opinion);

(c) That the appellees could have effectively sued

to prevent Keane from further stealing the corporate assets which gave value to the Class "A" common stock as well as all the other outstanding stock, or to remove Keane as president (see dissenting opinion).

CONCLUSION

We believe that this court by its opinion gives much more to the appellees than they even asked for when they commenced their action against F. C. Keane and appellant corporation in June of 1945. Appellees at that time were obviously seeking the Clayton Silver Mines Company stock remaining in the appellant's treasury for their own. In addition to securing all of that stock, appellees by their stipulated judgment secured the following judicial approval as to common Class "A," non-assessable stock, which appellees held:

"That the common stock "Class A" of the defendant, Independence Lead Mines Company, including the 600,000 shares owned by the plaintiffs, as aforesaid, *has, possesses, and is entitled to the same and identical rights, privileges and benefits, share for share, as the common stock of the said Independence Lead Mines Company, the only difference or distinction between the common stock and the common stock "Class A" being that the latter is not subject to assessment.*" (Italics supplied.) (Tr. page 49,50.)

From the above, it can be seen that the issuable controversy, which is of the greatest importance to the appellant corporation and to all of its assessable common stockholders, has gone by default of Keane and

appellees, and as a result of their collusion and connivance in securing judicial approval.

It is indeed ironic that the decree mentions “*the only difference or distinction between common stock and the common stock Class “A” being that the latter is not subject to assessment.*” In other words, the opinion says that common stock Class “A” is entitled to profits and dividends and all advantages of a financial nature accruing to any of the common stock held by common stockholders in many States of the United States; and the court is further judicially approving a situation where the common stockholders who have paid assessments on their stock to keep the corporation in business must continue to do so when assessments are levied; and the court is likewise judicially approving appellees’ right to be free from any contribution, assessment, or payment to the corporation for any expense necessary to the corporation’s life. At the present time appellees are given a lifetime moratorium on the payment of any stock obligation to the upkeep and life of this corporation. We submit to this Honorable Court, that this situation has fraudulently been brought into existence without even allowing the corporation to defend against the unjust claims of appellees, because of the connivance and collusion between appellees and Keane, the alleged president of the appellant corporation.

Furthermore, if the judgment of the court is to stand, we will be confronted with a situation in which the appellees may claim and possibly sustain their

right to vote their 600,000 shares of Class “A” common stock, something which they have never been able to do before they secured the stipulated judgment. The court’s opinion constitutes judicial approval of the transfer of tremendous control to appellees without even allowing the corporation a voice to oppose the same. The right to vote stock is most valuable, and the control of the appellees by virtue of the validity of their 600,000 shares of common stock, Class “A,” will be exercised in perpetual derogation of the right of the corporation to ever question its validity.

Therefore the appellant respectfully submits that a rehearing should be had and the decision be revised as to both law and fact, believing that a re-examination of the record made by the court after rehearing, wherein counsel may be able to assist the court better to examine the records, files and briefs in this cause, will result in a revision and reversal of the decision herein, and that a miscarriage of justice will occur if this case is not reversed.

Respectfully submitted,

R. MAX ETTER,

WILLIAM E. CULLEN,

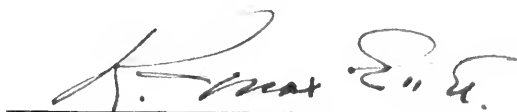
WALTER H. HANSON,

Attorneys for Appellant.

CERTIFICATE

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. Max Etter", is written above a horizontal line.

R. MAX ETTER.

No. 11961

United States
Circuit Court of Appeals
for the Ninth Circuit

HAMILTON FOODS, INC., a corporation,
Appellant,
vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation, and
JACK BELYEAR, doing business as Refriger-
ated Express Company,
Appellees,

and
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Appellant,
vs.

HAMILTON FOODS, INC., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division.

AUG 10 1948

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant and Cross-Appellee:

ALBERT H. ALLEN,
HYMAN GOLDMAN,
426 California Bank Bldg.,
9441 Wilshire Blvd.,
Beverly Hills, Calif.

For Appellee and Cross-Appellant:

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,
448 Santa Fe Bldg.,
121 E. 6th St.,
Los Angeles 14, Calif.

For Appellee Belyea, etc.:

LEO K. GOLD,
118 S. Beverly Dr.,
Beverly Hills, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

District Court of the United States for the Southern District of California, Central Division

No. 6835-Y

HAMILTON FOODS, INC.

Plaintiff,

vs.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a Kansas corporation;
JACK BELYEA, doing business as REFRIGERATED EXPRESS CO., DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Defendants.

COMPLAINT

(For Damages for Failure to Deliver Merchandise
in Good Condition)

The plaintiff complains and for cause of action against the defendants, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, Doe One and Doe Two, alleges as follows:

I.

That the plaintiff is a corporation duly organized under the laws of the State of Illinois and having its principal place of business in the City of Chicago, County of Cook, State of Illinois; that the defendant, The Atchison, Topeka and Santa Fe Railway Company, is a corporation duly organized and existing under the laws of the State of Kansas, doing business in the State of California, and having its principal office in the City of Los

Angeles, California. That the defendant, Jack Belyea, is a resident of the City of Los Angeles, California, and was doing business at all times [2] herein mentioned under the fictitious firm name of "Refrigerated Express Company"; that the matter in controversy exceeds, exclusive of costs, the sum of \$3,000.00, and the jurisdiction of the above entitled court is invoked on the grounds of diversity of citizenship.

II.

That the defendants Doe One, Doe Two, Doe Three and Doe Four are sued herein by such fictitious names for the reason that their true names and capacities are unknown to the plaintiff at this time. Plaintiff will ask leave of court to amend the Complaint and insert the true names and capacities when same are ascertained.

III.

That at all times herein mentioned the said defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, was a common carrier engaged in the business of carrying merchandise in interstate commerce from, among other places, the City of Chicago, County of Cook, State of Illinois, to the City of Los Angeles, County of Los Angeles, State of California. That on or about April 1, 1946, the said defendant, The Atchison, Topeka and Santa Fe Railway Company, received of the plaintiff at the City of Chicago, County of Cook, State of Illinois, One Thousand (1000) cartons of frozen vegetables and shrimp in good con-

dition, the property of the plaintiff, to be, by defendant, transported to the City of Los Angeles, County of Los Angeles, State of California, and said defendant corporation issued a bill of lading to the plaintiff for said goods, in which said bill of lading the plaintiff's agent, Gouley-Burcham Co., was named as consignee, and the destination of said goods was given as the City of Los Angeles, State of California. The plaintiff alleges that at all times herein mentioned he was and now is the lawful holder of said bill of lading.

That it became the duty of the defendant corporation to [3] transport said goods to the plaintiff's agent at the City of Los Angeles, in the State of California, and it was the duty of the defendant corporation to keep said goods in a frozen condition at all times by the proper and sufficient use of ice and salt, and to re-ice and use additional salt, as necessary in order to deliver said goods to their destination in an adequately frozen condition, so that said goods would be merchantable and remain satisfactory for human consumption.

IV.

That it became the duty of the defendant corporation to transport said goods to the plaintiff as aforesaid. However, in utter disregard of said duty in this behalf, the said corporation defendant failed and neglected to transport said goods so that they would arrive at their destination in a good and merchantable condition satisfactory for human consumption and failed to properly ice, salt and re-ice and add salt, as necessary.

V.

That by reason of the defendant corporation's failure and neglect of its said duty, 450 cartons of frozen vegetables and shrimp arrived at their destination in Los Angeles, California, in a poor condition; not adequately frozen and unfit for human consumption. That the reasonable value of said 450 cartons of frozen vegetables and shrimp is in the sum of \$4,455.00 and, in addition thereto, the plaintiff was required to pay the sum of \$294.75 for freight and was required to store said 450 cartons of goods until the disposition of this matter, at a cost to the plaintiff in the sum of \$464.75. That by reason of the negligence and the breach of duty of said defendant corporation, as afore-said, the plaintiff was damaged in the sum of \$5214.50. [4]

For a separate and second cause of action against the defendant, Jack Belyea, doing business as Refrigerated Express Co., Doe Three and Doe Four, the plaintiff alleges as follows:

I.

Repeats and realleges each and every allegation contained in Paragraphs I and II of plaintiff's first cause of action as though set forth in full herein.

II.

That at all times herein mentioned, the said defendant, Jack Belyea, doing business as Refrigerated Express Co. was a contract carrier engaged in the business of carrying merchandise in intra-state commerce in the State of California. That

on or about April 9, 1946, the said defendant, Jack Belyea, received from the plaintiff at the City of Los Angeles, County of Los Angeles, State of California, approximately 450 cartons of frozen vegetables and shrimp, the property of the plaintiff, to be by said defendant transported in certain quantities to San Francisco, California, and to Bakersfield, California. That said defendant, Jack Belyea, was to deliver 60 cases to Bakersfield, California, and 390 cases to San Francisco, California. The plaintiff alleges that at all times herein mentioned, he was the owner of said merchandise.

III.

That it became the duty of said defendant, Jack Belyea, to transport said goods as aforementioned and it was the duty of the said defendant, Jack Belyea, to transport said goods in such a manner so as to keep said goods in a frozen condition at all times and so that said goods would arrive at their destination as aforesaid in an adequately frozen condition, merchantable and satisfactory for human consumption.

IV.

That in utter disregard of said duty as aforesaid, the said defendant, Jack Belyea, failed and neglected to transport said goods [5] so that they would arrive at their destination as aforesaid in a good and merchantable condition satisfactory for human consumption.

V.

That by reason of the defendant, Jack Belyea's failure and neglect of duty as aforesaid, the 450

cartons of frozen vegetables and shrimp arrived at their said destination in a poor condition not adequately frozen and unfit for human consumption. That the reasonable value of said 450 cartons of said frozen vegetables and shrimp is in the sum of \$4,455.00, and, in addition thereto, the plaintiff was required to pay the sum of \$294.75 for freight and was required to store said 450 cartons of goods until the disposition of this matter at a cost to the plaintiff in the sum of \$464.75. That by reason of the negligence and the breach of duty of said defendant, Jack Belyea, as aforesaid, the plaintiff was damaged in the sum of \$5214.50.

Wherefore plaintiff prays for judgment against the defendants and each of them in the sum of \$5214.50, for costs of suit, and for such other and further relief as to the court may seem proper.

ALBERT H. ALLEN &
HYMAN GOLDMAN.

By HYMAN GOLDMAN.

(Verified.)

[Endorsed]: Filed April 21, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, hereinafter referred to as Santa Fe and for its answer to the

first cause of action pleaded in the complaint on file herein and answering for itself alone admits, denies and alleges as follows:

FIRST DEFENSE

I.

Answering Paragraph I, Santa Fe does not have any information or belief respecting the allegations as to plaintiff's organization and principal place of business or respecting defendant Jack Belyea's residence, place or manner of doing business, and on that ground denies said allegations. [8]

II.

Answering Paragraph II, Santa Fe does not have information or belief sufficient to enable it to answer the allegations of said paragraph II and on that ground denies said allegations.

III.

Answering Paragraph III, Santa Fe admits that it was and is a Kansas corporation, a common carrier of freight between Chicago, Illinois, and Los Angeles, California, admits that on April 1, 1946, it received from plaintiff at Chicago, Illinois, approximately one thousand cartons of vegetables and shrimp for transportation to Los Angeles, California, and that it issued a bill of lading therefor to plaintiff. Santa Fe denies each and every, all and singular, the allegations of said Paragraph III not heretofore expressly admitted.

IV.

Santa Fe denies each and every, all and singular, the allegations of Paragraphs IV and V; denies

that plaintiff was damaged in the sum of Five Thousand Two Hundred Fourteen Dollars and Fifty Cents (\$2,214.50) or in any sum or at all.

SECOND DEFENSE

I.

Santa Fe incorporates all the allegations set forth in its first defense and makes them a part hereof as if fully set forth herein.

II.

That Section 1(b) of the Terms and Conditions of the bill of lading referred to in complaint provides in part as follows: "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act or default of the shipper or owner, or for natural shrinkage." [9]

III.

That said cartons of vegetables and shrimp were improperly loaded by the plaintiff or its agents and employees so that said cartons could not be properly cooled during transit.

IV.

That the car in which said cartons were loaded arrived in Los Angeles April 9, 1946, and notice was given of such arrival on the same date, but plaintiff, its agents or employees failed to commence unloading said car until April 11, 1946.

V.

That the failure to properly load said cartons of vegetables and shrimp and to promptly unload said

cartons was the cause of the loss or damage, if any, suffered by the plaintiff; that the loss or damage, if any, suffered by plaintiff was caused by the act or default of the shipper or owner.

THIRD DEFENSE

I.

Defendant incorporates all allegations set forth in its first defense and makes them a part hereof as if fully set forth herein.

II.

Section 1(b) of the Terms and Conditions of said bill of lading referred to in the complaint provides in part as follows: "Except in case of negligence of the carrier . . . the carrier or party in possession shall not be liable for loss, damage or delay . . . resulting from a defect or vice in the property . . ."

III.

Santa Fe denies that the loss or damage, if any, suffered by the plaintiff was caused by its negligence and alleges that the loss or damage, if any, suffered by plaintiff was caused by a defect or vice in the property in that said [10] cartons and contents could not safely withstand and undergo transportation from Chicago to Los Angeles by railroad refrigerator cars without loss or damage occurring thereto, if, in fact, any such loss or damage did occur.

Wherefore, Santa Fe prays that plaintiff take nothing by its complaint on file herein and that it

be awarded its costs and disbursements herein incurred and such other and further relief as to the court may seem just and proper in the premises.

LEO E. SIEVERT,

J. H. CUMMINS,

Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company.

(Affidavit of Service by Mail.)

[Endorsed]: Filed May 12, 1947 [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Jack Belyea, sued herein as Jack Belyea, doing business as Refrigerated Express Company, and answers the complaint on file herein as follows:

I.

Answering Paragraph I of plaintiff's second cause of action, and directing said answer to incorporated Paragraph I of plaintiff's first cause of action, denies that he is a resident of the City of Los Angeles, California, but alleges that he is a resident of the City of El Monte, California.

II.

Answering Paragraph II of plaintiff's second cause of action, this answering defendant admits each and every allegation therein contained except that he received the shipment therein mentioned from the defendant, The Atchison, Topeka and

Santa Fe Railway Company, [12] and that part of the shipment was to go to Sacramento, Calif.

III.

Answering Paragraph IV of plaintiff's second cause of action, this answering defendant denies both generally and specially each and every allegation therein contained, but in this connection alleges that when the shipment of merchandise mentioned in the complaint was received by defendant, The Atchison, Topeka and Santa Fe Railway Company, and to be taken for further shipment by this answering defendant, the merchandise was in bad condition.

IV.

Answering Paragraph V of plaintiff's second cause of action, this answering defendant denies both generally and specially each and every allegation therein contained, and denies that the plaintiff was damaged in the sum of \$5214.50, or in any sum at all.

FIRST AFFIRMATIVE DEFENSE

I.

That on or about the 19th day of May, 1947, the defendant, Jack L. Belyea, was duly adjudicated a bankrupt under the Acts of Congress relating to bankruptcy by an order duly made and entered in the District Court of the United States, Central Division, Southern District of California, and the defendant having complied with all of the requirements of the law in that respect, it was thereafter ordered by said Court by an order duly made and entered therein that this defendant be discharged

from all debts and claims provable by said Acts against his estate, and which existed on or about the 19th day of May, 1947, on which day the petition for adjudication was filed by the bankrupt, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

II.

That the debt, which is the basis of plaintiff's suit herein, was due and owing to plaintiff on and prior to the date that this [13] defendant was adjudicated a bankrupt and was included in the schedule of debts annexed to said petition in bankruptcy, and is a debt provable against the bankruptcy estate of this defendant, and one from which a discharge in bankruptcy is a release under said bankruptcy acts.

III.

That on or about the 24th day of July, 1947, this defendant received a discharge in bankruptcy from the District Court of the United States, Southern District of California, Central Division, Case No. 44,985-Y.

Wherefore, this answering defendant prays that plaintiff take nothing by its complaint, and that he may be hence dismissed with his costs, and for such other and further relief as to the court may seem meet and proper in the premises.

/s/ LEO K. GOLD,

Attorney for Answering

Defendant, Jack Belyea.

(Verified.)

[Endorsed]: Filed Nov. 18, 1947. [14]

REPORTER'S TRANSCRIPT OF OPINION
OF THE COURT

Los Angeles, California, Tuesday, March 16, 1948.

Honorable Charles C. Cavanah, Judge, presiding.

In the case of Hamilton Foods Incorporated against the Atchison, Topeka & Santa Fe Railway Company, Case No. 6835, the court has reached the conclusion that the principles of law applicable are, first, that where damages are claimed by reason of loss or of injury to property entrusted to a common carrier for transportation, the burden rests upon the plaintiff to establish by a preponderance of the evidence the delivery of the property to the carrier, and where the action is founded upon negligence the burden rests upon the plaintiff to show that the shipment was delivered to the carrier in good condition or order.

When the plaintiff has made out a prima facie case of liability the burden then rests upon the carrier to rebut that prima facie case [21-B]

When proof is given by the plaintiff that property delivered to a common carrier in good condition was damaged while in the hands of the carrier, a presumption arises that the damage was due to the negligence of the common carrier and the burden of proof is upon that carrier to show that it was free from negligence, or that notwithstanding its negligence the damage occurred without its fault—that is, the negligence did not contribute to the damage.

The rule of perishable protective tariff approved by the Interstate Commerce Commission is that if goods arrive at the place of delivery in bad condition, which was caused by lack of ordinary care on the part of the carrier, it is liable. But a compliance with it is a defense against a charge of negligence. In other words, the measure of duty of the carrier was to use reasonable, ordinary diligence.

Under the protective tariff application to shippers of perishable properties, it must show that there was a lack of ordinary care on the part of the carrier. The carrier is not an insurer.

The only negligence in this case was that 40 cases of the shipment arrived in a damaged condition. The bill of lading applicable here provides that they must use 13,000 pounds of ice and 30 per cent of that amount in salt in the car in which the goods were shipped.

Now, when the car arrived here for delivery the plaintiffs were notified of its arrival. The plaintiffs sent an agent there to receive the delivery, said agent being a local concern in Los Angeles who had refrigerated truck equipment. This party arrived at the car. He opened the door of the car. He then closed it and went and got a thermometer. He says he placed it in the end of the car and that the temperature was 54 degrees. He then placed the thermometer under the cases involved which contained the shrimp creole, and the thermometer registered 50 degrees. [21-C]

He removed 550 cases and disposed of them in

this city and no complaint was made as to their damage. In other words, they were in good condition.

The remaining 450 cases, 40 of which were described as being damaged and of which they made a physical examination, the witness said he stuck his finger through the cases and into the shrimp and they were soft.

He then stated that he took the remaining 410 cases in his refrigerator truck and conveyed them to San Francisco and there they discovered they were in bad or damaged condition.

Now, the court is called upon to reason out these circumstances. Did the shipper's own act when its agent went to this car and opened it up and closed it and then went and got a thermometer and came back and opened the car up again, did that expose this shipment to such condition that it no doubt brought about the damage to the remaining 410 cases? Also transporting it from Los Angeles to San Francisco—did those acts of the shipper after receiving the goods at the car, broke the seal, received the merchandise, went in and took possession and the handling of this shipment was the real cause of the damage.

I feel that the railroad company has complied with the tariff protective regulations and the bill of lading under which it was governed in delivering this shipment on its track here in Los Angeles. The evidence shows that only 25 to 40 cases were really in a damaged condition. As to the rest, the shipper relied upon his thermometer that he placed

in the car, opening the door and exposing this shipment which the witnesses all testified as soon as the doors were opened a gush of cold air come out of the car, which is natural.

You cannot say that after the shipper took possession of this car, that when the shipment arrived in San Francisco, [21-D] from the time the shipper took possession of the car, nothing occurred to place the merchandise in a damaged condition.

As I say, only 40 cases were discovered to be in a damaged condition, and at \$9.90 a case that would be \$396.00 plus the freight on those 40 cases, so the court has reached the conclusion that the plaintiff can recover \$396.00 plus the freight on those 40 cases against the defendant, and costs.

Findings and decree will be prepared by the plaintiff according to the views expressed.

[Endorsed]: Filed June 15, 1948. [21-C]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on March 9, 1948, Albert H. Allen and Hyman Goldman, by Albert H. Allen, appearing as attorneys for plaintiff, and Leo E. Sievert, Louis M. Welsh, Frederic A. Jacobus and J. H. Cummins, by Louis M. Welsh, appearing as attorneys for defendant, The Atchison, Topeka and Santa Fe Railway Company, and

Jack Belyea, doing business as Refrigerated Express Company, defendant, appearing by Leo K. Gold, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, the Court finds the facts as follows: [22]

FINDINGS OF FACT

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business in the City of Chicago, County of Cook and State of Illinois; that the defendant, The Atchison, Topeka and Santa Fe Railway Company, for brevity referred to as Santa Fe, is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and having its principal office and place of business in California, in the City of Los Angeles, County of Los Angeles and State of California; that the defendant, Jack Belyea, doing business as Refrigerated Express Company, is a resident of the City of El Monte, County of Los Angeles, State of California.

2. That the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, and the Court has jurisdiction by reason of diversity of citizenship.

3. That the Santa Fe is a common carrier and is engaged in handling merchandise in interstate commerce and is subject to the rules and regulations of the Interstate Commerce Commission and

subject to the protective tariffs approved by said Commission and in force on April 1, 1946; that the defendant, Jack Belyea, doing business as Refrigerated Express Company, likewise is a common carrier subject to the same rules and regulations.

4. That on April 1, 1946, the plaintiff, Hamilton Foods, Inc., through its agent, Fulton Market Cold Storage Company of Chicago, Illinois, for brevity referred to as Fulton, delivered to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for shipment to Los Angeles via Chicago, Milwaukee, St. Paul and Pacific Railroad and the Santa Fe, by refrigerated car to Los Angeles, one thousand (1000) cartons of frozen shrimp creole, which said frozen shrimp creole was packed approximately twenty-five pounds to the carton; each carton contained small packages weighing [23] approximately fourteen (14) ounces each; that said merchandise was delivered to the railroad carriers in a good and frozen condition, said merchandise at that time being frozen at a temperature of fifteen (15) degrees to twenty (20) degrees below zero; that car No. ERDX 2667, in which said merchandise was placed, subsequent to delivery, was under the control of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company from Chicago to Kansas City and thereafter said car was under the control of the defendant, Santa Fe, from Kansas City to Los Angeles; that said car was pre-cooled prior to the merchandise being loaded, having been emptied of frozen poultry which arrived

in a good and frozen condition just shortly prior to the loading of the merchandise in said car.

5. That prior to the delivery of the merchandise to Fulton in Chicago, Illinois, the plaintiff prepared its product by cooking the shrimp and adding cooked vegetables and then immediately freezing it in their plant to a temperature of twenty degrees below zero, where it was kept in such frozen condition until delivery to Fulton; that Fulton kept the merchandise in its refrigerated storage plant at a temperature of twenty degrees below zero.

6. That the shipping instructions provided that the merchandise was to go by Chicago, Milwaukee, St. Paul and Pacific Railroad to Kansas City and from Kansas City by Santa Fe and the shipping instructions contained the following instructions:

“Insure icing to capacity 13,000 lbs. crushed ice and 3900 lbs. salt re-ice to capacity, crushed ice 30% salt at all regular icing stations and oftener if delayed;”

that these instructions were proper and adequate for the shipping of the frozen shrimp creole and the instructions usually given for the shipping of frozen foods.

7. That the loading of the car commenced at 1:00 p.m. on April 1, 1946 and the car was iced to capacity with 13,000 lbs. [24] of ice and 3900 lbs. of salt by the Chicago, Milwaukee, St. Paul and Pacific Railroad at 2:00 p.m.; that the loading was completed at 3:00 p.m. on the same day, and

that prior to the car being sealed there was added 1000 lbs. of dry ice which was placed in the car on top of the merchandise; that the car left Chicago on April 2, 1946 at 11:30 a.m.

8. That the merchandise was delivered to the carriers in good and frozen condition and left Chicago in good and frozen condition.

9. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company issued to the plaintiff a bill of lading consigned to plaintiff care of Gouley-Burcham Co., at Los Angeles, California, plaintiff's Exhibit 5, which was the contract between the parties; that the merchandise was the property of the plaintiff and the plaintiff is the proper party to bring this action.

10. That by stipulation it was established that the car was iced as follows:

	Ice	Salt	Date (1946)	Time
Chicago	13,000 lbs.	3,900 lbs.	April 1	2:15 p.m.
Savannah	3,000 lbs.	900 lbs.	April 2	5:00 p.m.
Kansas City	1,000 lbs.	300 lbs.	April 4	1:40 a.m.
Kansas City	1,000 lbs.	300 lbs.	April 4	2:05 p.m.
Waynoka	1,000 lbs.	450 lbs.	April 5	6:53 a.m.
Clovis	600 lbs.	180 lbs.	April 5	9:10 p.m.
Belen	600 lbs.	180 lbs.	April 6	11:35 a.m.
Winslow	900 lbs.	270 lbs.	April 7	8:45 a.m.
Needles	900 lbs.	270 lbs.	April 7	10:20 p.m.
San Bernardino	1,500 lbs.	450 lbs.	April 8	7:05 p.m.

which were regular icing stations, and that the car arrived at San Bernardino, California, at 7:05 p.m. on April 8, 1946, at which time 1500 pounds of ice and 450 pounds of salt were added.

11. That the car arrived in Los Angeles at 12:01 a.m. [25] on April 10, 1946 and was placed on the

Bay Street Perishable Team Track in Los Angeles at that time and was made available to the consignee at the Bay Street Perishable Team Track in Los Angeles on April 11, 1946.

12. That no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946 and the time it was unloaded on April 11, 1946, at the Bay Street Perishable Team Track in Los Angeles, which said track is owned by and under the control, supervision and jurisdiction of Santa Fe.

13. That Los Angeles is a regular icing station.

14. That it was stipulated by and between the parties that the temperatures at the various cities through which the car passed, and on said dates, were as follows:

City	Date	Maximum Temperature	Minimum Temperature	Mean Temperature
Chicago	4-2-46	50	32	41
Kansas City	4-4-46	69	48	58
Waynoka	4-5-46	82	49	66
Clovis	4-5-56	76	55	66
Winslow	4-7-46	67	42	54
Needles	4-7-46	76	53	64
San Bernardino	4-8-46	62	47	54

That the temperatures in Los Angeles on April 9, 10 and 11, 1946, were as follows:

4-9-46	68	47	58
4-10-46	85	51	68
4-11-46	88	62	75

15. That Belyea had made inquiry of defendant Santa Fe's agent as to the arrival of car ERDX 2667 and upon being advised that the car had arrived on the Bay Street Perishable Team Track of Santa Fe, the defendant Belyea signed the receipt,

plaintiff's Exhibit 6; that at the time the receipt was signed [26] the penciled notation did not appear on said exhibit, they having been added by defendant Santa Fe's agent without the knowledge of defendant Belyea or plaintiff.

16. That after signing the receipt, plaintiff's Exhibit 6, defendant Belyea broke the seals of the car and observed that there was no gush of cold air or vapor as usually appears when the temperature of a car is low. He further observed that the merchandise visible near the door was so soft and defrosted that his finger penetrated through the outer carton, the inner package and the merchandise itself; that said cartons so visibly soft numbered twenty-five to forty, and that thereupon he closed the door of the car and immediately called the defendant Santa Fe's agent and complained of the warmth of the car and requested a thermometer; that the defendant Santa Fe's agent did not have a thermometer and thereupon defendant Belyea walked a block, obtained a thermometer and returned with the thermometer to the car; that he opened the doors of the car and placed the thermometer in the rear of the car, closed the door and permitted the thermometer to remain there for fifteen minutes, after which time the thermometer was removed and it indicated a temperature of fifty-four (54) degrees; that thereupon he again placed the thermometer between the packages of shrimp creole, closed the door and again permitted the thermometer to remain in the car fifteen minutes, and thereupon removed the thermometer, at

which time the thermometer registered fifty degrees.

17. That the defendant Belyea thereupon called the representative of Pickin-Time Frozen Foods Company who were to receive five hundred and fifty (550) cases of the frozen shrimp creole, who observed that some cartons in the car were still **hard and** so the defendant Belyea hand-picked five hundred and fifty (550) hard cartons and delivered them to Pickin-Time Frozen Foods Company in Los Angeles, California; that there was a shortage of [27] frozen shrimp creole on the market; that Pickin-Time placed the cartons in its freezer, froze the cartons and disposed of the merchandise in the regular channels, in the regular course of trade.

18. That the defendant, Belyea, then attempted to find refrigerated space in Los Angeles for the balance of the merchandise which was to have been shipped to Bakersfield and San Francisco and called every refrigerated warehouse in Los Angeles and as far as Pomona without being able to find space for the shrimp creole; that thereupon the defendant, Belyea, placed the remaining four hundred and fifteen (415) cases of shrimp creole in his refrigerated truck and delivered the same in Bakersfield and San Francisco where the merchandise was rejected as having been spoiled.

19. That the defendant, Belyea, moved the merchandise in a refrigerated truck which had six inches of spun glass insulation on the sides and ceiling, six inches of cork in the floor; that his

truck was a modern truck and had a complete blower and refrigeration equipment, and that at the time the shrimp creole in question was shipped to Bakersfield and San Francisco there also was placed in the same truck frozen cauliflower and frozen broccoli which arrived in Bakersfield, Sacramento and San Francisco in a good and frozen condition and accepted by the consignees; that the shrimp creole was rejected in Bakersfield, Sacramento and San Francisco as being damaged; that the defendant Belyea's truck was capable of reducing the temperature of a commodity ten to fifteen degrees if the commodity was above twenty-five degrees when placed in the truck, and could maintain any temperature below twenty-five degrees.

20. That one of the consignees in Bakersfield who received fifty (50) cartons found the merchandise damaged but filed no claim because the merchandise had not been paid for by him and was still the property of the plaintiff. [28]

21. That each carton of frozen shrimp creole was valued at Nine Dollars and Ninety Cents (\$9.90) and that it was stipulated between the parties and the Court finds that the fifty (50) cases which were received in Bakersfield and the Three Hundred and Sixty-Five (365) cases which were received in San Francisco, or a total of Four Hundred Fifteen (415) cartons, were received at Bakersfield and San Francisco in a damaged condition and was contaminated and was not fit for human consumption; that said merchandise was a total loss to the plaintiff, and that said loss totaled

Four Thousand One Hundred Eight and 50/100 Dollars (\$4108.50) plus the loss of freight in the sum of Two Hundred Sixty Nine and 75/100 Dollars, (\$269.75).

22. That it was the duty of the defendant, Santa Fe, to transport said goods to the plaintiff at Los Angeles in a good and merchantable condition, satisfactory for human consumption.

23. That the merchandise was shipped under the protective tariff, applicable to shippers of perishable merchandise.

24. That it is not true that the defendant Belyea was guilty of any negligence.

25. That the defendant Belyea received a discharge in bankruptcy in the U. S. District Court, Southern District of California.

From the foregoing findings of fact, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the plaintiff owed the burden of proving that the merchandise was shipped in a good and merchantable condition, and that the plaintiff established that burden of proof by a preponderance of the evidence.

2. That the plaintiff made out a prima facie case upon showing that the merchandise was properly shipped in good condition and that 40 cases arrived at Los Angeles in a damaged condition and that thereupon the [29] burden rested with the carrier to rebut the prima facie case made out by the plaintiff.

3. That when property delivered to a common carrier in good condition arrives at its destination in a damaged condition a presumption arises that the damage was due to the negligence of the common carrier and the burden of proof is upon the carrier to show that he was free from negligence, or that notwithstanding its negligence, the damage occurred without its fault, that is, the negligence of the carrier did not contribute to the damage.

4. That under the perishable protective tariff, approved by the Interstate Commerce Commission, if goods arrive at the place of delivery in damaged condition which was caused by the lack of ordinary care on the part of the carrier, the carrier is liable; but a compliance with the conditions of the perishable protective tariff approved by the Interstate Commerce Commission is a defense against any charge of negligence and the measure of the duty of the carrier is to use reasonable ordinary diligence.

5. That under the protective tariff applicable to shippers of perishable properties, the plaintiff must show that there was a lack of ordinary care on the part of the carrier as the carrier is not an insurer.

6. That where merchandise is shipped through one carrier and subsequently reshipped through another carrier, the plaintiff may maintain an action for damages against the carrier who has delivered the shipment of merchandise to the destination set forth in the bill of lading and such delivering carrier is responsible for the loss or damage

sustained by the shipper, even though the loss or damage occurred while the shipment was in possession of another carrier. If the loss or damage was sustained while the shipment was in possession of such other carrier, then the delivering carrier may recover the amount of such loss or damage from the carrier that caused the loss or damage.

7. That the merchandise, having been re-shipped from Los Angeles to Bakersfield and San Francisco, and having arrived there in a damaged condition, from the circumstances it would appear that the Railroad Company complied with the protective tariff regulations and with the Bill of Lading under which it was governed in delivery of the shipment to its track in Los Angeles.

8. That the only visible damage was to forty (40) cases of shrimp creole.

9. Since only forty (40) cases were visually discovered to be damaged at the time the merchandise was taken from the car in Los Angeles, Plaintiff is entitled to damages for the forty (40) cases so visible at Nine Dollars and Ninety Cents (\$9.90) per case, or a total of Three Hundred Ninety-six Dollars (\$396.00) plus freight in the sum of Twenty-six Dollars (\$26.00) said freight being on the forty cases for which damages are given to the plaintiff, together with interest from April 1, 1946 in the sum of Fifty-three and 15/100 Dollars (\$53.15), and costs of suit; that said judgment be against the defendant The Atchison, Topeka and Santa Fe Railway Company, a Kansas Corporation; that

the action be dismissed as to the defendant Jack Belyea, doing business as Refrigerated Express Company.

Let Judgment be entered accordingly.

Dated: March 29th, 1948.

/s/ CHARLES C. CAVANAH,
Judge of the United States
District Court.

Approved as to form:

LEO E. SIEVERT, LOUIS
M. WELSH, FREDERIC
A. JACOBUS and J. H.
CUMMINS.

By LOUIS M. WELSH,

Attorney for Defendant The Atchison, Topeka and
Santa Fe Railway Company.

/s/ LEO K. GOLD,

Attorney for defendant Jack Belyea d/b/a Refrigerated Express Company.

[Endorsed]: Filed March 29, 1948. [31]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 6835-Y

HAMILTON FOODS, INC.,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion, JACK BELYEA, doing business as Re-
frigerated Express Company, DOE ONE, DOE
TWO, DOE THREE and DOE FOUR,

Defendants.

JUDGMENT

This cause having been brought on for trial be-
fore the Honorable Charles C. Cavanah, Judge of
the above entitled Court on the 9th day of March,
1948, and continuing thereafter to the 10th day of
March, 1948, and a jury having been duly waived,
and the Court having heard the witnesses on the
part of the plaintiff and the defendants, and having
examined the documentary evidence introduced on
behalf of the plaintiff and defendants, and having
heard the argument of counsel, Albert H. Allen
appearing on behalf of the plaintiff, Louis M.
Welsh of counsel of Leo E. Sievert, Louis M.
Welsh, Frederic A. Jacobus and J. H. Cummins,
having appeared for the defendants, The Atchi-
son, Topeka and Santa Fe Railway Company, and

Leo K. Gold having appeared for the defendant Jack Belyea, doing business as Refrigerated Express Company, [32] and the cause having been submitted to the Court for consideration and decision, and, after due deliberation thereon, the Court filed its Findings of Fact and Conclusions of Law in writing and orders that judgment be entered herein in accordance therewith in favor of the plaintiff, Hamilton Foods, Inc., and against the defendant, The Atchison, Topeka and Santa Fe Railway Company; that a judgment of dismissal be entered as to the defendant Jack Belyea, doing business as Refrigerated Express Company.

Wherefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed, that Hamilton Foods, Inc., a corporation, the plaintiff, do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, the sum of Three Hundred Ninety-six Dollars (\$396.00) in damages, together with the sum of Twenty-six Dollars (\$26.00) as freight, and together with interest on the said sum of Three hundred Ninety-six Dollars (\$396.00), from April 1, 1946, in the sum of Fifty-three Dollars and Fifteen Cents (\$53.15), together with its costs and disbursements incurred in this action, amounting to the sum of \$105.80; that the plaintiff take nothing as against the defendant Jack Belyea, doing business as Refrigerated Express Company, and that

the defendant Jack Belyea have judgment for his costs incurred herein in the sum of \$.

Dated this 29th day of March, 1948.

/s/ CHARLES C. CAVANAH,
Judge of the United States District Court.

Approved as to Form:

LEO E. SIEVERT,
LOUIS M. WELSH,
FREDERIC A. JACOBUS and
J. H. CUMMINS,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant Santa Fe.

/s/ LEO K. GOLD,
Attorney for Defendant Belyea.

Judgment entered Mar. 29, 1948. Docketed Mar. 29, 1948. Book C.O.49, Page 623.

EDMUND L. SMITH,
Clerk,

By /s/ MURRAY E. [illegible]
Deputy. [33]

Received copy of the within Judgment this 24th day of March, 1948.

/s/ LOUIS M. WELSH,
Attorney for Defendant A. T. & S. F. Ry. Co.

[Endorsed]: Filed March 29, 1948. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

Notice is hereby given that the plaintiff, Hamilton Foods, Inc., hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on March 29, 1948.

Dated this 9th day of April, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 10, 1948. [35]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
TO BE CERTIFIED FOR APPEAL TO THE
CIRCUIT COURT OF APPEALS

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

You are hereby requested to prepare the record
for the United States Circuit Court of Appeals for
the Ninth Circuit in connection with the Appeal
taken herein, to consist of the following:

1. Complaint, filed April 21, 1947.
2. Answer of The Atchison, Topeka and Santa Fe Railway Company, filed May 12, 1947.
3. Answer of Jack Belyea, filed November 18, 1947.
4. Stipulation of Facts, dated March 8, 1948, filed March 9, 1948.

5. Stipulation of Facts, dated March 9, 1948, filed March 9, 1948. [37]

6. Deposition of Alvin H. Mazer taken January 6, 1948, Plaintiff's Exhibit 3, filed March 9, 1948.

7. Deposition of Alvin H. Mazer taken March 3, 1948, Plaintiff's Exhibit 3A, filed March 9, 1948.

8. Deposition of Hale C. Burrus taken January 6, 1948, Plaintiff's Exhibit 4, filed March 9, 1948.

9. Deposition of Hale C. Burrus taken March 3, 1948, Plaintiff's Exhibit 4A, filed March 9, 1948.

10. Original Bill of Lading, dated April 1, 1946, from Hamilton Foods, Inc., Plaintiff's Exhibit 5, filed March 10, 1948.

11. Freight Delivery Receipt No. 2778 RM, Defendant's Exhibit A, filed March 9, 1948.

12. Carbon Copy of Form 1891, Standard No. 316, dated April 9, 1946, Defendant's Exhibit B, filed March 10, 1948.

13. Excerpts from Perishable Protective Tariff No. B of Interstate Commerce Commission No. 22, Defendant's Exhibit C, filed March 10, 1948.

14. Plaintiff's Points and Authorities, filed March 15, 1948.

15. Defendant's Motion for Judgment, filed March 10, 1948.

16. Reporter's Transcript of Evidence, Vols. 1 and 2.

17. Judge's Oral Opinion transcribed, filed March 15, 1948.

18. Findings of Fact and Conclusion of Law,
filed March 29, 1948.

19. Judgment filed March 29, 1948.

20. Notice of Appeal, dated April 10, 1948,
filed April 10, 1948.

21. Statement of Points on Appeal.

22. Notice and Designation of Record to be cer-
tified.

You are requested to certify the foregoing to the
United States Circuit Court of Appeals for the
Ninth Circuit within forty (40) days from April
10, 1948.

Dated April 10, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,
Attorneys for Plaintiff
and Appellant.

[Endorsed]: Filed April 10, 1948. [38]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING OF NOTICE

State of California,
County of Los Angeles—ss.

Albert H. Allen, being first duly sworn, deposes
and says that affiant is a citizen of the United
States of America and a resident of the County
and State aforesaid; that affiant is over the age of

eighteen (18) years and is not a party to the within entitled action; that affiant is an attorney at law, being attorney for the plaintiff appellant and that affiant has his business address at 9441 Wilshire Boulevard, Beverly Hills, California; that on the 9th day of April, 1948, affiant served the Notice of Appeal upon the defendants by serving a copy therewith on their attorneys as hereinafter set forth; that on the 10th day of April, 1948, affiant served a copy of the Statement [39] of Points on Appeal, a copy of the Designation of Contents of Record on Appeal, and a copy of the Notice to the Clerk, of attorneys to be served; that said documents were served on the aforesaid dates by placing a true copy thereof in each instance in an envelope addressed to the attorneys of record for said defendants in said action, which said envelopes were addressed to the attorneys of record for said defendants at the office address of said attorneys as follows: Robert W. Walker, J. H. Cummins and Louis M. Welsh, 448 Santa Fe Building, 121 East Sixth Street, Los Angeles 14, California; Leo K. Gold, 118 South Beverly Drive, Beverly Hills, California, and by sealing said envelopes and depositing the same, with postage thereon in full prepaid, in the United States mail at the city where is located the offices of the attorneys for the persons by and for whom said service was mailed.

That there is a delivery service by United States mail at the place so addressed, and there is a regu-

lar communication by mail between the place of mailing and the place so addressed.

/s/ ALBERT H. ALLEN.

Subscribed and sworn to before me this 10th day of April.

/s/ HYMAN GOLDMAN,
Notary Public in and for said County and State.

[Endorsed]: Filed April 13, 1948. [40]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

To the Clerk of the Above Court:

Notice is hereby given that The Atchison, Topeka and Santa Fe Railway Company, one of the defendants above named, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 29, 1948.

Dated this 13th day of April, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Cross-Appellant, The Atchison, Topeka and Santa Fe Railway Company.

[Endorsed]: Filed April 14, 1948. [41]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a Cross Appeal hereby taken. You will include in said transcript:

1. All of the evidence introduced at the time of trial and transcribed by the court reporter.
2. All exhibits admitted into evidence.
3. All stipulations of the parties admitted into evidence.
4. All orders, rulings and judgments of the court.
5. All pleadings presented to the court. [42]
6. This Praecipe and service thereon.

Said transcript is to be prepared as required by law and the rules of the court and the Federal Rules of Civil Procedure, and especially Rules 73 (g) and 75 (k) of the Rules of Civil Procedure for the District Courts of the United States.

Dated: April 14, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

/s/ By LOUIS M. WELSH,

Attorneys for Cross-Appellant, The Atchison,
Topeka and Santa Fe Railway Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 14, 1948. [43]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR CLERK TO
FILE RECORD AND DOCKET APPEAL**

Upon the Affidavit of Albert H. Allen, one of the attorneys for the plaintiff, and upon the stipulation of counsel for the defendant, Louis M. Welsh, and upon good cause therefor being shown and it appearing that additional time is required to file the record and docket the appeal in the above entitled action, It Is Ordered that the time to file the record and docket the appeal and cross-appeal in the above entitled action be extended for an additional forty (40) days' time from the day in which the Clerk is now required to file the record and docket the appeal and cross-appeal.

Dated: This 10th day of May, 1948.

LEON R. YANKWICH,
Judge, United States District
Court.

[Endorsed]: Filed May 10, 1948. [45]

[Title of District Court and Cause.]

STIPULATION

Be And It Is Hereby Stipulated by and between the plaintiff, by and through one of its attorneys, Albert H. Allen, and the defendant, by and through Louis M. Welsh, that the time for filing the record and docketing the appeal and cross-appeal in the

above entitled action be extended for a period of forty (40) days' time from the day in which the Clerk is now required to file the record and docket the appeal and cross-appeal.

Dated: This 4th day of May, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

/s/ By LOUIS M. WELSH,
Attorneys for Defendants-Appellees.

[Endorsed]: Filed May 10, 1948. [46]

[Title of District Court and Cause.]

STIPULATION AND ORDER

Be It And It Is Hereby stipulated by and between the plaintiff-appellant, by and through Albert H. Allen and Hyman Goldman, its attorneys, and the defendant-appellee, by and through Louis M. Welsh, that the Clerk of the above entitled Court be required to transmit all of the original exhibits in the above entitled action in their original form without requiring said Clerk to make copies there-

of, and that said original exhibits may be used in the appeal and cross-appeals before the United States Circuit Court for the Ninth Circuit.

Dated: This 4th day of May, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

/s/ By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

/s/ By LOUIS M. WELSH,
Attorneys for Defendant-Appellee. [47]

ORDER

Good cause appearing therefor it is ordered that the Clerk transmit to the Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in evidence in the above entitled action.

May 10, 1948.

/s/ By LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 10, 1948. [48]

In the District Court of the United States, Southern District of California, Central Division
[Title of Cause.]

CERTIFICATE OF CLERK

I. Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain

full, true and correct copies of Complaint; Answer of Defendant The Atchison, Topeka and Santa Fe Railway Company; Answer of Defendant Jack Belyea, etc.; Plaintiff's Points and Authorities; Motion for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Affidavit of Mailing; Notice of Cross-Appeal; Praecipe for Transcript of Record; Order Extending Time to File Record and Docket Appeals and Stipulation therefor; and Stipulation and Order for Transmission of Original Exhibits which, together with original Plaintiff's Exhibits 1, 2, 3, 3-A, 4, 4-A and 5 and Original Defendants' Exhibits A, B and C, and Original Stipulation Approving Narrative Statement in Lieu of Transcript, Original Narrative Statement, and copy of Reporter's Transcript of Opinion of the Court, transmitted herewith, constitute the record on appeal and cross-appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.00 one-half of which has been paid by the appellant and one-half of which has been paid by the cross-appellant.

Witness my hand and the seal of said District Court this 24th day of June, A.D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk.

/s/ By THEODORE HOCKE,
Chief Deputy.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 6835-Y

HAMILTON FOODS, INC.,

Plaintiff-Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas corporation;
JACK BELYEA, doing business as REFRIG-
ERATED EXPRESS COMPANY, DOE ONE,
DOE TWO, DOE THREE and DOE FOUR,
Defendants-Appellees.

STIPULATION APPROVING NARRATIVE
STATEMENT IN LIEU OF TRANSCRIPT

Be It And It Is Hereby Stipulated by and be-
tween the plaintiff-appellant, Hamilton Foods, Inc.,
by and through Albert H. Allen and Hyman Gold-
man, its attorneys, and the defendant-appellees and
cross-appellants, The Atchison, Topeka and Santa
Fe Railway Company, a Kansas corporation, by
and through Louis M. Welsh, Frederic A. Jacobus
and Joseph H. Cummins, its attorneys, that the
Narrative Statement attached hereto be and the
same is hereby considered as the agreed statement
of the testimony in that certain action determined
by the above Court, and that the same may be
printed in lieu and in place of the Reporter's Tran-

script of the testimony in the above action, the Narrative Statement to be used in the appeal and cross-appeal of the above entitled action.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

/s/ By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

LOUIS M. WELSH,
FREDERIC A. JACOBUS,
JOSEPH H. CUMMINS,

/s/ By LOUIS M. WELSH,
Attorneys for Defendant-Appellee, The Atchison
Topeka & Santa Fe Railway Company.

[Endorsed]: Filed June 14, 1948. Edmund L.
Smith, Clerk.

[Title of Circuit Court of Appeals and Cause.]

NARRATIVE STATEMENT

Be It Remembered that at the hearing in the above entitled cause, before the Honorable Judge Charles C. Cavanah, commenced on March 9, 1948, there appeared the following: Albert H. Allen, of Albert H. Allen and Hyman Goldman, on behalf of the plaintiff, and Louis M. Welsh, of Louis M. Welsh, Frederic A. Jacobus and J. H. Cummins, on behalf of the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas Corporation; that Leo K. Gold, attorney for the defendant, Jack Belyea, doing business as Refrigerated

Express Company, did not appear at the proceedings.

TESTIMONY OF ALVIN H. MAZER

on behalf of plaintiff, on direct examination by Norman H. Arons, through deposition taken in Chicago, Illinois.

My name is Alvin H. Mazer. I live at 230 North Pine Avenue, Chicago, Illinois. I am a frozen food processor and am associated [1*] with Hamilton Foods, Inc. They are located at 301 North Halsted Street, Chicago, Illinois. I am President of the company. I have supervisory duties. I take care of the factory. I supervise all shipments of merchandise. Hamilton Foods processes primarily shrimp products. By processing we mean that we prepare them in different forms. We prepare them, cook them and freeze them. At our present quarters we have our own freezing facilities and storage facilities. In April, 1946, and prior thereto, we were located at 231 West Chicago Avenue. We had our own sharp freezer and storage on the premises for maintaining the storage of frozen foods. We did not have enough facilities to store all our foods there. We froze and processed shrimp among our other products. At that time, all we processed at 231 West Chicago Avenue was shrimp creole exclusively. During the period of February, 1946, to April, 1946, we processed in excess of 1000 cartons of shrimp creole. From February 4, 1946, to and including March 27, 1946, I caused to be delivered

*Page numbering appearing at foot of page of original certified Transcript of Record.

(Testimony of Alvin H. Mazer.)

to the Fulton Market Cold Storage Company, Chicago, Illinois, 1000 cartons of frozen shrimp creole. It was not taken over in one shipment, we made several shipments. There are 25 pounds net to each carton. I know, of my own knowledge, the condition of the shrimp creole that was delivered to the Fulton Market Cold Storage Company during the period of February 4, 1946, to March 27, 1946. That merchandise was frozen at 15 to 25 degrees below zero, maintained at zero to 5 below and delivered in that condition to the Fulton Market Cold Storage Company. The Fulton Market Cold Storage Company is located at 1000 West Fulton Street and that is less than a mile from 231 West Chicago Avenue. It would take not more than ten minutes to transport the shrimp to Fulton. I gave instructions to Fulton as to the thousand cartons of shrimp creole that had been delivered by Hamilton. I advised them where the car was shipped to and specifically instructed them as to having a car that was pre-cooled and the condition of the car being such that it could handle frozen [2] foods. Those directions were given on or about April 1, 1946. I gave those instructions to the shipping department, that is, the traffic department of Fulton Market Cold Storage. The car was to be loaded with 1000 cartons of shrimp creole and shipped to Gouley-Burcham Company in care of Bay Street Perishable Team Track of Los Angeles. It was to be shipped through Chicago Milwaukee and St. Paul

(Testimony of Alvin H. Mazer.)

to Kansas City and thence west through Santa Fe. After the shipment of this car Fulton Market Cold Storage Company had no additional shrimp on hand. During the period mentioned we did not bring over in excess of a thousand cartons to Fulton.

Question: The particular shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge was in good condition at the time it was packed and then shipped to Fulton Market Cold Storage Company?

Mr. Welsh: That portion we object to. We object, your Honor, to the question on the ground that it calls for a conclusion of the witness and there are no facts to support it. Now, the testimony so far has brought out that the shrimps were prepared, cooked and frozen. There is no testimony to indicate where those shrimps came from. I believe the court can take judicial notice of the fact that the shrimp do not come from any fresh water area, particularly not around Chicago. They must have come from some seaport to Chicago. There is no attempt to explain that and the question that asks the witness whether or not the shrimp were in good condition has no support in order to permit the court to accept his conclusion.

Mr. Allen: The witness was qualified, if the court please, as being a food processor.

The Court: Well, the court will reserve the ruling on the admissibility of this answer until you

(Testimony of Alvin H. Mazer.)

complete what other evidence you want to introduce as to the qualifications of this witness to express his opinion. I will reserve ruling on that. [3]

The Witness: I am able to state of my own knowledge that the particular shrimp creole that was shipped to Gouley-Burcham Company was in good condition at the time it was packed and then shipped to the Fulton Market Cold Storage Company. On April 1, 1946, we ordered dry ice in the amount of 1000 pounds to be sent over to Fulton Market Cold Storage to be included in that car as an added precaution.

The deposition of Alvin H. Mazer was then offered and admitted in evidence without further objection, saving the admissibility of the question and the answer raised by Mr. Welsh. Plaintiff's Exhibit 3A.

FURTHER TESTIMONY OF ALVIN H. MAZER

on behalf of plaintiff on cross-examination by Francis J. Steinbrecher, attorney for the defendant, The Atchison, Topeka and Santa Fe Railway Company, taken in Chicago, Illinois, Norman H. Arons, attorney, appearing for the plaintiff.

Cross-Examination

By Mr. Steinbrecher:

I am the Alvin H. Mazer, residing at 230 North Pine Avenue, Chicago, Illinois, who testified on the previous examination and deposition given by me

(Testimony of Alvin H. Mazer.)

January 6, 1948. I have been engaged in processing frozen foods at our plant at 231 West Chicago Avenue, for some time. We are not located there now. We are located at 301 North Halsted Street. At the time this shipment was made, we were located at 231 West Chicago Avenue. The only item we processed for a year prior to that shipment was shrimp creole. Prior to that time we processed other frozen foods. This particular shipment consisted of shrimp creole. I had experience in the shipment of shrimp creole before this particular shipment. It is pretty hard to say how many pounds of frozen shrimp creole we actually shipped prior to this shipment, but guessing it, it was with reference to cases or percentage of capacity. We have shipped to Los Angeles frozen shrimp creole from Chicago, which we shipped over Santa Fe. [4] There was no different refrigeration given that shipment than the one we are discussing at the present time. We shipped about 20 to 25 L.C.L. shipments and straight carload shipments by rail before this shipment. I can't give you the exact number or the approximate number of pounds in those shipments. I may have made more than 25 shipments by rail prior to this shipment, but I would say 20 to 25. Some of those shipments went to the West Coast in carload lots. The temperature of the car should be from 15° above zero downwards to properly preserve the shrimp during transportation. A part of this claim relates to the

(Testimony of Alvin H. Mazer.)

shipment transported to San Francisco. In processing the shrimp, we clean the shrimp, cook them, add them to a batch of prepared mixed vegetables, put them in small 14 oz. packages, seal them and freeze them from 30° to 35° below zero, pack them 24 packages to a shipping carton. Each package weighs 14 oz. We leave them in the temperature of 30° to 35° below zero until they are frozen, which is normally 8 hours then we hold them in a holding room from zero to 10° below. There can be a variance of 5° one way or the other, but they are held. When we get an order for shrimp creole to be shipped to the West Coast, we would accumulate 1000 cases or the amount of the order, at a cold storage plant, and give them instructions where we would want the merchandise shipped. At the time, our quarters were not large enough to hold 1000 cartons. Also we would have to ship out to one central point and rather than clutter the 1000 cases and move them as we would accumulate additional stock, we would send them over to the Fulton Cold Storage where they would hold it under the proper conditions. Our experience has been with previous shipments that the merchandise is not highly perishable if kept under proper refrigeration conditions. There would not be any more difficulty about getting it to its destination in a fit condition for human consumption if correctly handled. Even if the shipment might be as far away from Chicago as the Pacific Coast. [5]

(Testimony of Alvin H. Mazer.)

Redirect Examination of Mazer

The Hamilton Foods, Inc., is a corporation organized and existing under the laws of the State of Illinois, and it was such a corporation at the time of the institution of this suit. I am acquainted with and know the fair market value in the City of Chicago, as well as the City of Los Angeles, of 450 cases of shrimp creole at the time the shipment in question was made.

Question: Will you state what the fair market value is?

Mr. Steinbrecher: I want to object to that for this reason, there is no showing that he is qualified to say what the fair market value is on the Pacific Coast, inasmuch as he is a resident of Chicago and in business here.

Mr. Arons: I will qualify him further if you have objections.

The witness: Previous to my association with Hamilton Foods, I was a food broker. I dealt in frozen foods. Prior to my association with Hamilton Foods, I was a food broker for seven years. During that time, I had occasion to know the market value from time to time of various frozen foods, both in Chicago and the State of California on the West Coast.

Mr. Welsh: We shall so stipulate, Mr. Allen, that the value of your loss is \$9.90 times the number of cartons lost, but our objection to this question is still pressed, your Honor.

(Testimony of Alvin H. Mazer.)

Mr. Allen: We are stipulating that \$9.90 is the price per case.

The Witness: I knew particularly what the fair market value was of shrimp creole both in the City of Chicago and in the City of Los Angeles, California.

Question: Will you state what the fair market value was of 450 cases of frozen shrimp creole weighing 25 pounds a case, or carton?

Mr. Welsh: We make the same objection to that question.

The Court: Overruled. [6]

The Witness: It was \$4455.00. The freight charges as to this particular shipment of shrimp creole was \$294.75. Up to the time of suit, the storage charges in San Francisco where the shrimp creole was stored pending this litigation was \$464.75, and it has been accruing at the rate of \$35.40 per month. I do have an opinion as to whether a temperature of 50° to 54° would be sufficient to maintain frozen shrimp creole in good condition. Merchandise at 54° is not fit for human consumption.

Mr. Welsh: We have another objection. We do not feel that the storage bills, your Honor, are a measure of damages.

The Court: I will reserve ruling on that until I hear you in the argument. We will admit it, but the Court reserves ruling on the objection that the

(Testimony of Alvin H. Mazer.)

storage bill is not a proper item of damages, and I will hear you in your argument.

Question: Do you know at what the maximum or highest temperature that frozen shrimp creole can be maintained without decomposing or deteriorating?

Mr. Welsh: We object to both of the two questions and answers.

The Court: The same ruling.

The Witness: Would a shipment of shrimps arriving at a temperature of 50° or 54° be suitable for sale to the trade?

Answer: Definitely not.

Mr. Welsh: We object to this. There is nothing in the evidence, your Honor, to show that these shrimp were held at 50° or 54° yet this question is being asked of him as an alleged expert. He is not qualified. Mr. Arons himself previously stated that his knowledge of shipping had nothing to do with his knowledge of processing and I can read the section back to you, sir.

The Court: The same ruling.

The Witness: I would say that the maximum or highest temperature that frozen shrimp can be maintained without decomposing or [7] deteriorating would be from 20° to 25° above zero. If the temperature went above 20° to 25° the shrimp would begin to deteriorate and would not be fit for human consumption. It would start to decompose.

(Testimony of Alvin H. Mazer.)

Question: Do you know from your own experience what temperature would be maintained as a result of the instructions which were given to the railroad company here?

The Witness: A temperature of 10° to 15° above zero with a possibility of 20° high.

Mr. Welsh: The objection goes to this question also.

The Court: Objection overruled.

Recross-Examination of Mazer

By Mr. Steinbrecher:

The temperature of 50° to 54° which I have just testified to as undesirable would not necessarily have to prevail for some time, because the temperature does not drop from 20° to 54° in one minute. It is a gradual decomposition along the route. In other words, if it were 54° it would necessarily have to have reached the 54° temperature over a period of time, and food starts decomposing after a certain time, at a gradual stage. It is not instantaneous. I testified that a temperature of 20° to 25° above zero would be undesirable and would be unsuitable for the proper preservation of shrimp creole. A temperature of 50° to 54° would be undesirable for the preservation of shrimp creole. If we assume that the shrimp in this particular shipment, which I testified to, was subjected to a temperature of 54° , it is pretty hard for me to answer as to what my opinion would be of how soon deterioration in the shrimp would set in. A gradual

(Testimony of Alvin H. Mazer.)

decomposition takes place. The actual minute it takes places or where the actual breaking point is, I can't give you the answer to that. But, I have told you, over a certain temperature, any frozen food product will start to deteriorate and when it reaches 54°, it may have broken down at 30° or 35° and the balance of it over 50° to 54° may have been two hours, I would not know, but [8] it is gradually decomposing, but I can't tell you in hours what it would take. When you take a package of frozen food out from under refrigeration into an ordinarily heated room, it is immediately subjected to a temperature of whatever that room is. If the room were heated to a temperature of 80°, that package of frozen food would be subjected to a temperature of 80°. It would not become unfit for human consumption immediately upon being subjected to that 80°. If frozen shrimp creole is subjected to a temperature of 54° the mere fact that the package in which it is contained comes in contact with that temperature would not render the frozen shrimp creole unfit for human consumption unless that temperature were maintained for a period of time.

Mr. Welsh: We wish to renew our objection to the questions indicated for the record. There is nothing in the record at present to support hypothetical questions such as were asked—the condition of the car, the amount of ice put in the car. There is nothing except a bland statement about a car ar-

(Testimony of Alvin H. Mazer.)

living with a temperature of 50° or 54°. We submit, your Honor, there is no foundation laid for such questions and move they be stricken.

The Court: The objection is overruled.

Mr. Welsh: It is probably time then, for me to raise again my objection to a question on direct examination which you reserved. The question is located on my copy of the first deposition on page 7, and it reads as follows: "The particular shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge, was in good condition at the time it was packed and then shipped to Fulton Market Cold Storage Company?"

Now, our objection is predicated on the basis that although Mr. Mazer may be qualified as a food processor and may be qualified to state that everything he did to those shrimp was correct, there is nothing in the record to indicate where the shrimp came from or what condition they were in at the time they were processed. And as I [9] stated before, the court can take judicial notice of the fact that shrimp do not live in fresh water such as Lake Michigan and must have come from some seaport before they ever reached the plaintiff in this case. We therefore feel that the witness is not qualified to state generally as to the condition of the shrimp at that time, although he may be able to state what he did to shrimp and whether or not he processed the shrimp and whether or not those processes

(Testimony of Alvin H. Mazer.)

would turn out normal shrimp or healthy shrimp and in good condition.

The Court: Does his testimony show that he saw and knew this shrimp that is in question here?

Mr. Welsh: No, your Honor, it does not.

Mr. Allen: Excepting this, your Honor. I think the court can take judicial notice of the fact that a processor who is putting up a product which he is going to sell to the public, which he is going to label, which is going to go into interstate commerce and be subject to the Pure Food and Drug Act, isn't going to take a bad item and put it into a package.

Mr. Welsh: The court can't take judicial notice of that.

Mr. Allen: If I ship a carload of pencils I have a right to testify that when I shipped those pencils I shipped them in good order. I don't have to testify that I used a microscope to examine the material that was in them in order to so testify.

Take a processor like Van De Camps, who pack tuna or salmon or a processor or something—a man like Dole who ships out carloads of pineapple. The man who ships it and packs it in the carton has a right to testify whether or not at the time he shipped the carton it was in good condition without tracing the pineapple from the time it left the plantation to the time it got to the packing house.

Mr. Welsh: Those items are subject to an inspection of the United States Department of Agri-

(Testimony of Alvin H. Mazer.)

culture and the plaintiff here could have introduced evidence to show they were in good condition at the time they went into processing, but here we have an expert [9A] witness, an alleged expert witness, testifying as to the condition generally and not specifically of an item.

Now, he is qualified to testify as to whether the product he prepared, namely, shrimp creole, was proper but not as to the shrimp—that is, he can't as an expert testify as to the condition of the shrimp. Evidence could be brought in to show that but not from this man's qualifications.

Mr. Allen: That isn't what the question says. The question says the shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge was in good condition at the time it was packed and then shipped to the Fulton Market Cold Storage Company, and the answer was, "Definitely."

Who else could tell except that processor?

Mr. Welsh: Your Honor, the shrimp creole could not be in good condition unless the shrimps were too. This is a compound product.

The Court: He is asking the direct question if he is able to tell whether this particular shipment was of good quality.

Mr. Welsh: There is nothing to indicate that he examined this particular shipment in the record. He explained generally how they process it but he didn't examine this particular shipment.

(Testimony of Alvin H. Mazer.)

The Court: This particular shipment is the primary factor involved. What was its condition at the time of shipment? Now, I realize that the plaintiff is predicating the opinion of this witness on his general experience in the past, being engaged in the business of shipping shrimp. I understand his reasoning, but whether or not one who ships shrimp would have to examine each particular shipment other than his general observation before he could testify whether it was in a bad or good condition—I am doubtful if they would have to do that.

Mr. Welsh: We are not asking anything unreasonable of the plaintiff. We don't expect them to examine every shrimp that goes in a can. [9B]

Mr. Welsh: We feel that inasmuch as the shrimp were gotten from some other location and were subjected to transportation prior to the time they were prepared, that they should at least bring in evidence showing from where they came, how they were shipped, the condition they were in when they opened the cars in Chicago and took the shrimp out and what they did with it generally to show the development of the case from the time the shrimp were taken out of the ocean and what happened to the shrimp from the time it arrived in Chicago and was taken out of the refrigerator car and put into process. That is not unreasonable.

Mr. Allen: If your Honor please, 500 cases or 450 cases of this same shipment were good and were used in the ordinary course of trade.

(Testimony of Alvin H. Mazer.)

Now, if counsel wants to pin-point that we deliberately picked bad shrimp from the ocean and shipped bad shrimp to Chicago and put those bad shrimp into cartons and shipped the bad shrimp out here for the purpose of this lawsuit that is another story.

Mr. Welsh: The argument is two-edged inasmuch as 450 cases arrived in good condition in that car. Perhaps they all arrived in good condition.

Mr. Allen: Would you like me to explain why it happened?

Mr. Welsh: It is irrelevant.

Mr. Allen: I shall be more than happy to explain to the court why that condition took place.

Mr. Welsh: The evidence will show that if at all.

Mr. Allen: Certainly it will.

The Court: I will give this matter a little further thought when I examine the entire testimony and see whether or not the doctrine you assert prevails. I will reserve my ruling until later.

Mr. Welsh: Do you wish our objection to be raised at the end of the trial, sir?

The Court: Yes. [9C]

The Court: But in considering the form of the question, it is asking for his own knowledge and it would seem he could answer that. Then if he did not have knowledge, you could have cross-examined or you could have argued here before the court that

(Testimony of Alvin H. Mazer.)

he did not have any knowledge and therefore that his opinion has no weight. But as far as his disability is concerned, it is a question as to his own knowledge so I think I will have to overrule the objection. I wanted to bring that up before you recessed. I think that when considering the form of the question that it is all right but you can argue as to the weight when we come to that.

The depositions of Mazer were then received in evidence as Plaintiff's Exhibits 3A and 3B.

TESTIMONY OF HALE C. BURRUS

taken on direct examination by Norman H. Arons in deposition in Chicago, Illinois.

Direct Examination

My name is Hale C. Burrus. I live at 4867 West Concord Place, Chicago, Illinois. I am Assistant Superintendent of Fulton Market Cold Storage Company. They are located at 1000 West Fulton Street, Chicago, Illinois. My particular duties consist of supervising, unloading, loading, and storage of merchandise. I have been with the Fulton Market for 24 years. Prior to the time I was Assistant Foreman, I was a checker. I was Assistant Superintendent for 18 years, 6 years as checker and cooler foreman. I am acquainted with the method and manner of packing perishable foods in refrigerator cars to be shipped across country. Between February 4, 1946, and April 1, 1946, we received from the Hamilton Foods, Inc., 1000 cartons of shrimp creole for storage. These were received at various

(Testimony of Hale C. Burrus.)

times between those dates. On February 12, 1946, we received 125 cartons, our Lot No. 23903; on February 13, 1946, 250 cartons, our Lot No. 24241; on March 18, 1946, 300 cartons, our Lot No. 25404; on March 27, 1946, 300 cartons, our Lot No. 25790; on April 1, 1946, 25 cartons, our Lot No. 25878. All of the shipments which I just mentioned were thoroughly frozen. Upon receipt of the cartons, we unloaded them off the truck, put them in our storage room which is held at 15° below zero. On April 1, 1946, we received instructions to ship the merchandise from Hamilton Foods, Inc. We had instructions to ship these five lots which amounted to 1000 cartons of shrimp to Gouley-Burcham, c/o Bay Street Perishable Team Track, Los Angeles, California. We loaded these 1000 cartons into ERDX 2667. That is the number of the car. This car [10] arrived at the Fulton Market Cold Storage Company April 1, 1946, which we set for unloading at 7:00 o'clock that morning. The car contained frozen poultry at that time. The poultry in the car arrived in perfect condition. The merchandise was perfect. The car was pre-cooled at the time of its arrival. The 1000 cartons of shrimp in question were loaded into that car in the afternoon of that day. The cartons were laid on the floor two and three cartons high in the car. The car came in with 10,300 pounds of crushed ice in the morning. Around 2:00 o'clock in the afternoon, it was then filled to capacity with crushed ice and 3900 pounds

(Testimony of Hale C. Burrus.)

of salt. The Chicago, Milwaukee and St. Paul Railroad caused it to be so filled. The car was sealed with our seals. Fulton Market Cold Storage Company seals Nos. 4563 and 4564. Instructions were given to the Chicago, Milwaukee and St. Paul Railroad with reference to the icing in transit. The particular instructions were as follows: "Initial icing to capacity with 13,000 pounds crushed ice and 3900 pounds of salt. Re-ice at all regular ice stations with crushed ice and 30% salt and oftener, if delayed." In addition to that there were 20 cakes of dry ice furnished by the Hamilton Foods Company, Inc., which were distributed throughout the top of the load. The ice was placed in the car by us. Each cake of ice weighed approximately 50 pounds. Each carton averaged 25 pounds of shrimp. The particular shipment was placed in Car No. ERDX-2667, which is a refrigerated car. In my experience for over 18 to 24 years this type of car has been used regularly in the shipment of perishable foods. There are different types of cars from the particular type of car for the shipment of perishable foods. Some of these cars have side-striping. From my experience I can say that the percentage of cars with striping is very, very small. From my experience in loading perishable foods in refrigerated cars, I would say that the practice which we used and engaged in in loading this car was good practice. This practice has been used by us before. It had been used thousands [11] of times

(Testimony of Hale C. Burrus.)

without any loss of food or materials. I have no opinion as to whether cars with stripping or cars without stripping are better so far as keeping the merchandise refrigerated. My experience has been that one car is as good as the other. Percentage-wise, less than 5% of the refrigerated cars have stripping on them. We finished loading the car about 3:00 o'clock in the afternoon. We started about a quarter after one. The St. Paul iced the car at around 2:00 o'clock.

Cross-Examination

of Hale C. Burrus taken by Francis J. Steinbrecher.
Deposition in Chicago, Illinois.

I am the same Hale C. Burrus residing at 4867 West Concord Place, Chicago, Illinois, who testified at the previous examination in this matter. I am the Assistant Superintendent of the Fulton Market Cold Storage Company, which is located at 1000 West Fulton Street, Chicago. With reference to the shipment of frozen shrimp creole, my experience has been regarding the refrigeration, that is proper refrigeration, necessary in a freight car for transportation of that commodity is to ice the capacity with crushed ice, 30% salt. That is the initial icing. I mean that if there were a 1000 pounds of ice, there would be 300 pounds of salt. That is the first initial icing, the preparation of the car for shipment. If a car comes in that has already had ice in them, it is topped off to the capacity of the car and 30% of the capacity of the car is put in, not

(Testimony of Hale C. Burrus.)

just 30% of what they top the car off with. I am speaking of a car that came in under load in this particular instance. The car came in under load. This particular car that carried this shipment at the time had 10,200 pounds of ice in the car. Now when we reloaded this car with the creole, the balance of the car, the capacity of the car, crushed ice was put in this car. But a total of 30% of the salt was put in. In other words, the capacity of this car is 13,000 pounds of crushed ice and a total of 30% is added to [12] it which is 3900 pounds of salt. That would be filling the bunkers to the top. There were 20 cartons of dry ice distributed on the packages of creole throughout the load. These packages weighed an average of 50 pounds each. Only dry ice was put in the body of the car. I can't recall that we have had experience with this particular type of car. We have had shipments of frozen foods all the time. We have had experience in the shipment of frozen food in cars of this type and in this type of car. With other commodities, anyway. I don't believe there is anything particularly perishable about shrimp creole to make this shipment of frozen shrimp creole require a greater care in handling than any other type of frozen product. The car which was used was suitable for the purpose. I can't recall having any particular experience in preparing a car of frozen shrimp creole from Chicago to the Pacific Coast, but we have had vari-

(Testimony of Hale C. Burrus.)

ous other frozen foods for shipment. The frozen shrimp creole was maintained at our storage warehouse prior to being placed in the freight car at a temperature of 15° below zero. The salt and dry ice that was placed in this car should maintain the temperature of this car from Chicago to the Pacific Coast, assuming that the car was re-iced and re-salted at regular stations en route, at a temperature of between 10 and 15 degrees above zero. There was no stripping on this car, as I recall. Stripping has various meanings. Some cars just have a piece of a half an inch, maybe an inch strip of lathe nailed to the side of the car. That is board nailed to the frame of the car, nailed to the side of it on the inside. I presume it is for ventilation. Stripping the car would prevent the lathing from being placed against the wall of the car. The purpose of it would be to permit easier ventilation or circulation of air throughout the car. There are other ways of stripping a car. A few cars have a rack, some sort of a rack that is nailed along the side in the same manner, only that may protrude out maybe 2 inches. You can also strip a car by placing board or lathe between each layer of the commodity shipped. [13] You can also strip a car by putting lathes in between the tiers in the car. That would also be called stripping. The preparation given to this car, in the way of pre-cooling, and the request for re-icing enroute, would normally be sufficient to maintain this commodity in a suitable con-

(Testimony of Hale C. Burrus.)

dition enroute from Chicago to California, assuming, of course, it was given regular re-icing stations.

Re-direct Examination

By Norman H. Arons. Deposition in Chicago, Ill.

I would say that a car arriving at a temperature of fifty to fifty-four degrees would be an improperly refrigerated car, with reference to the type of shipment involved in this suit. If a car were iced in accordance with the instructions in this particular case, the car would not arrive at a temperature of fifty to fifty-four degrees. The relationship between the percentage of salt and the amount of ice to maintain the temperature is this: the more salt you use, the lower your temperature and the cars have to be iced regularly, not later than every twenty-four hours in order to maintain that temperature that you have in there. The more salt you have the colder the temperature you get, but the less time it lasts.

Re-Cross Examination

By Francis J. Steinbrecher. Deposition in Chicago, Illinois:

The 54 degree temperature that would be suitable for this shipment would have to be maintained for a period of hours rather than minutes to damage the commodity.

The Deposition of Hale C. Burrus was then offered and received in evidence, the deposition of Mr. Mazer being Plaintiff's Exhibits No. 3-A and No. 3-B and the deposition of Mr. Burrus being Plaintiff's Exhibit No. 4-A and No. 4-B.

TESTIMONY OF JACK BELYEA

called as a party defendant in Direct Examination under the rules.

Direct Examination

By Albert H. Allen:

Mr. Welsh then raised the objection that the defendant, Belyea, was not properly called as a party defendant under the Rules by reason of the fact that the defendant was a bankrupt.

The Court: He is still a party to this action. The only difference is that the bankruptcy proceedings has discharged him from the payment of any judgment that might be entered against him in this action. He is still a party to the action and he has not been dismissed. I think he would come under the Rules that you are calling him under. He hasn't been dismissed. He is still a defendant. I will have to grant your contention, Mr. Allen.

The witness then testified as follows:

I reside at 604 Vane Avenue, El Monte. I was subpoenaed at one time jointly with the Atchison, Topeka and Santa Fe, and when I say "subpoenaed" I mean I was served with summons and complaint. At present I am in sales and traffic and employed by the Belview Creamery and Produce Company. My duties consist of sales work and traffic management. In that work I handle frozen products. On April 11, 1946, I was the owner of a refrigerated express or refrigerated trucking concern. That business consisted of transporting perishable commodi-

(Testimony of Jack Belyea.)

ties or anything requiring refrigeration. Prior to April 11, 1946, for about 18 months, I was in business for myself, and prior to that time I had been handling perishable commodities in shipment, for approximately 10 years. About April 8, 1946, I received a notice as to a shipment of shrimp creole consigned to Gouley-Burcham and Company, of Los Angeles. I received notice by telephone that a car of shrimp creole was due to arrive and they at that time notified me of the car number and stated that it would be spotted on the Bay Street team track for distribution. I was to [15] await the proper papers giving me the breakdown as to who the consignees would be on the merchandise. At that particular time there were 500 cases destined to come off in Los Angeles and they would give further shipping instructions upon arrival of the car.

Q. Now when was the first time that you received any information that the car was here?

Mr. Welsh: We object to the question, your Honor. It is irrelevant when Mr. Belyea received notice. It is relevant when the consignee received notice but not when Mr. Belyea received notice.

The Court: Objection overruled. It is just preliminary.

The Witness: If I recall, I believe I first received notice on the 10th of April that the car was in Los Angeles, but had not been spotted on the Bay Street perishable team track as yet, and that Mr. Holman would notify me when the car was available and for unloading. However, if I recall, that

(Testimony of Jack Belyea.)

car was not spotted in a place on the team track where we could unload it; that there had to be another switch engine come in and hook on that car to transport it to another track more suitable for unloading.

The track, as I recall, had no roadway into it and there were cars lined up on the opposite side from where there was no road so it was completely blocked off from getting in to open it up and transport out any of the merchandise. Mr. Holman is the Santa Fe man in charge of the Bay Street perishable team track. Between April 8 and April 10, I made a couple of checks to find out what information he had upon this particular car. I made those checks with Mr. Holman. Mr. Holman hadn't any information at the time. He said that he would call when the car was in and spotted.

Q. Now, when was the first time that you had any information that the car was in and spotted and available for unloading?

Mr. Welsh: May I ask counsel, your Honor, information from whom? [16]

Mr. Allen: From the Santa Fe.

Mr. Welsh: Your Honor, I would like to place my objection again. The rail carrier is under an obligation to notify the consignee named in the bill of lading of the arrival of a car. Mr. Belyea isn't a party to this action. He was not a consignee named in the bill of lading and it is beyond me to see the relevancy of when Mr. Belyea was informed unless

(Testimony of Jack Belyea.)

it is first connected up to show his name appeared on the bill of lading.

Mr. Allen: May we ask this, your Honor? May we ask your Honor to withhold the ruling at this moment and let me proceed further with this witness and whether we will connect it up by bringing in the consignee who will testify.

The Court: Very well, I will withhold ruling and unless you make the connection the objection will be granted.

Q. By Mr. Allen: When was the last time you spoke with Mr. Holman as to the location of this car prior to its actually being spotted on the Bay Street team track?

Mr. Welsh: If Mr. Allen is going ahead with this line of questioning, your Honor, I think I am justified in objecting on the ground that—

The Court: He will make a connection?

Mr. Welsh: He is asking about a condition and giving no place, time, circumstances, or anything else, or persons present or how the conversation took place.

The Court: As to his dealing with the railroad. You have to make some connection before his evidence will be competent here to bind the railroad.

The Witness: I am trying to recall when I first observed the car. It was in the afternoon and I don't recall whether it was either the 10th or 11th of April. I observed the car on the same day on which the car was opened. I don't recall whether that was the 10th or the 11th. It seems like it was

(Testimony of Jack Belyea.)

a Thursday. It was a [17] Thursday. The car was opened in the afternoon. When I reached the car the car was sealed, the seal had not been broken. To all apparent appearances, the door was all right. I broke the seal. I tried to open the door and I had to have a little assistance to get the door open. Apparently it was jammed. I got the door open with a little help. When I opened the door, the first thing I spotted were the wet cases. The wet cases were located along the side where the door opened. It was along the side of the door opening. When I observed that the cases were wet, I pressed against one of them with my hand and felt it quite soft, so I pushed my finger against the carton, and it was so wet that it went right on through and into the inside container. I closed the car up. I went with one of the employees of my firm down to the office to get Mr. Holman and I went over in search of a thermometer. I was able to locate one a block away, and brought it—I was able to borrow it and brought the thermometer back with me. Between the time that I opened the door and went to get the thermometer I closed the door. It took me ten minutes to get the thermometer. When I came back with the thermometer, Mr. Holman was there. He asked me what the difficulty was and I told him that we had some bad order merchandise in that car. Mr. Holman said “What are you going to do” and I said “I am going to take temperatures and find out. It is so late in the day we are going to have to start to move.”

(Testimony of Jack Belyea.)

Mr Welsh: Well, of course, your Honor, what Mr. Holman said is purely hearsay.

Mr. Allen: Mr. Holman is the agent of the Santa Fe Railroad. Is there any dispute about that?

Mr. Welsh: No dispute that he is the agent.

The Court: It was within the scope of his authority to be there and act for the railway company.

Mr. Welsh: It is within the scope of his authority to open cars, to give them to a consignee but not make remarks concerning [18] the condition of the lading.

The Court: Objection overruled.

The Witness: Mr. Holman asked me what I was going to do and I told him I had better take the temperatures. So we proceeded to open up the car and put the thermometer in. Mr. Holman was present at the time. I put the thermometer on top of the load. I placed it with the back of it up against a case, to stand it upright and closed the car back up again. I took a reading on that thermometer. It was 54 degrees. I left the thermometer in the car 15 minutes before I took the reading. Mr. Holman was present at the time. I took a subsequent reading. The subsequent reading was taken by placing the thermometer underneath the floor racks in the car. I believe Mr. Holman was present at the time. He left for a few moments to go back up to the office and he came back again and I believe that he was there, if I recall, when the thermometer was removed the second time. The thermometer regis-

(Testimony of Jack Belyea.)

tered 50 degrees. Then I closed the car up and went to call Mr. Lloyd Smith of Gouley-Burcham Company. Mr. Smith wasn't in town so the only thing to do was to find someone that would have knowledge of what should be done about the merchandise, so Mr. Dominis, who was with the Pic'N'Time Frozen Foods, who was the largest consignee in the car, I called to have him come over and make an inspection. He came over and he made an inspection in my presence and in the presence of Mr. Holman. Mr. Holman asked Mr. Dominis what he thought of the condition of the merchandise and he told him that he thought he could save a number of cases, due to the fact that they were located so close to the team track, which was approximately $\frac{3}{4}$ ths of a mile, and we could transport it over there and get it into his sharp freeze, and that he thought his merchandise would be all right. I proceeded to unload the car. Mr. Dominis stayed there for the greater portion of the unloading time and he was able to pick what he wanted to. Mr. Dominis did not take the cases just as [19] they came out of the car. If they showed no evidence of being soft or wet or mushy, he accepted them. He took the cases which were hard and appeared frozen and those were the cases which he removed. If I recall, I believe he removed 450. If I recall, there were 50 more cases consigned to another frozen food company and we also delivered those 50 cases, which made a total, if I recall, of 500 cases that came off

(Testimony of Jack Belyea.)

in Los Angeles. Those 50 cases were not hand-picked.

Q. Were they also handpicked? A. No.

Q. Just took the cases which appeared hard?

A. That is right.

Mr. Welsh: I object to that question as leading and putting a conclusion in the mouth of the witness.

The Court: Sustained. It is leading.

The Witness: As to the other 50 cases, we never made any special effort to pick over the cases for them due to the fact that they were located so close by we just picked them at random. The soft merchandise, that was apparently already gone, we left in the car. I would estimate there were somewhere between 25 and 40 cases. The 25 to 40 cases which we didn't touch at all we just left in the car until the reefer arrived. As to the other 400 some cases, shortly afterwards the line reefer truck that was destined to take it on to its destination arrived and we completed the unloading. When I found evidence that the shrimp was soft, I made an attempt to find available refrigeration plant space in Los Angeles. I tried to get Mr. Dominis to take the balance of it in but his storage plant was all filled up and he couldn't take any more than he already had consigned to him. So, I called everyone in town. In fact, as far as Pomona I called to secure space to put this merchandise away, because due to the condition of it it should have been put in a sharp freeze to pull the temperature back down on it so

(Testimony of Jack Belyea.)

it could go on to its destination. I was not able to find any space. By a reefer I mean a refrigerated truck, the temperature controlled by mechanical refrigeration with insulated body. I had a Diesel [20] truck and trailer. It was a reefer. It had four inches of spun glass as insulation. It had a mechanical refrigeration cooling system operated by a gasoline motor and electric generator. It was in operation that day. The refrigeration on my truck does not operate as a freezing unit. It couldn't freeze due to the fact that it won't bring the temperature down to freeze a commodity. However, it will hold a temperature that it was in—that was in the commodity at the time of acceptance. In other words, if the commodity was 10 degrees it would hold the commodity at that point and if it was zero it would hold it at that point and at 50 degrees it would hold it at whatever point the commodity was with the exception that there might be a loss of a few degrees of temperatures over a period of time. We had regularly used this reefer truck for hauling other perishable merchandise. We had never had any trouble mechanically with it. The merchandise was loaded into this reefer. Fifty cases were consigned to Bakersfield. I don't recall the amount of cases that were consigned to Sacramento. And the balance that was left over between Bakersfield and Sacramento was to go into San Francisco for several consignees. When the merchandise got up there it was apparently not acceptable. When Mr. Holman was present and the door of the car was opened, I

(Testimony of Jack Belyea.)

called his attention to the fact that the merchandise was wet and soft because I wanted to take a blanket exception on the whole car. I didn't want to accept any responsibility so far as I was concerned. The car was in bad order. Mr. Holman said he wanted to arbitrate as to how many cases were bad. He would allow me to take an exception of some, but he wouldn't allow me a blanket exception on the entire car. Under the circumstances when time was running out, it was getting late in the day and no cold storage facilities available, the only alternative left to protect all parties concerned was to get it on the truck immediately and get it transported to its destination. I know what the condition was in Los Angeles at that time as to cold storage space. It was very critical. I attempted to find cold storage space to move this merchandise into. It was 4:30 in the afternoon [21] when I finished unloading the car. I can't remember what else might have been said by Mr. Holman, it would be just a guess, it has been so long ago. The Bay Street terminal is in the industrial district in Los Angeles. There are no facilities there for unloading other than the roadway where you can get into the side of the car. Mr. Holman has an office there. His office is on the end of the perishable dock. When I went to call Mr. Holman I went to his office. Prior to the day on which this car was unloaded I had talked with Mr. Holman on the telephone. If I recall, I believe I called him two or possibly three times to find out when he had some definite idea when it would be spotted

(Testimony of Jack Belyea.)

so I could program my work ahead. Mr. Holman told me he would notify me.

Mr. Welsh: I object to that on the grounds, your Honor, that it is not relevant whether Mr. Holman said he would notify him or not. We are now contesting a contract action.

The Court: He said he was going to connect it up. If it is not connected up it will be stricken. Mr. Holman represented your people.

Mr. Welsh: But Mr. Holman doesn't have authority to re-organize contracts for us.

The Court: This is preliminary to what was done and then we will determine what his authority was. It is preliminary. What the agent's authority was is another question. Go ahead.

The Witness: I knew Mr. Holman approximately 18 months prior to this time. I had unloaded merchandise from that area before. If Mr. Holman was on duty I would contact him to determine whether a car was available for unloading. If he was not on duty I would contact any other people that were associated down there at the team track that happened to be on duty at the time. In other words, I was acting as agent for the consignee in moving the merchandise. And as to the availability of cars for unloading, I would contact the Santa Fe office. The Santa Fe office would tell me when the car was available for unloading. I am sure I unloaded the car on the [22] same day it was available for unloading. I know there was some difficulty about the car being spotted. I am just a little hazy between

(Testimony of Jack Belyea.)

dates, whether it was the 10th or 11th and I don't quite recall which day that was.

The Court: Who was attempting to spot this car? Who was attempting to do that?

Mr. Welsh: The Santa Fe Railway.

The Witness: I attempted to check the ice in the car. I found some ice in the car. I would estimate the bunkers were half full. There was no dry ice on the packages. The wrappers that had been around the dry ice were still there but the dry ice was no longer present. When I opened the door to the car it did not appear to be very cool because there was not the sudden gust of vapor and cold air that usually comes out of a car when it is opened. When you open a car there is usually a gust of cold air that comes out. When I opened this door, I did not find any such evidence.

Mr. Welsh: I would again like to raise my objection before I begin cross examination, inasmuch as counsel has tied up with Mr. Belyea the Gouley-Burcham Company, the consignee, but in no place has he indicated that the Santa Fe, the other contracting party, had notice of Belyea's connection with Burcham and Company and we feel therefore that the evidence as to when Mr. Belyea was notified is irrelevant, sir.

The Court: Objection overruled.

Cross Examination

By Mr. Welsh:

I had approximately 10 years' experience with frozen foods. I have seen quite a few refrigerated

(Testimony of Jack Belyea.)

cars in my time. There are some cars that have insulation more than others. I know that some refrigerated cars have built in stripping along the inside of the doors and sides and some are new and some are old. The bunker [23] capacities of refrigerated cars vary. In the newer cars there are bigger bunkers. They are bigger in the newer ones than in the older cars. I told you the other day that I had been on the transportation committee of the Southern California Frozen Food Council. That Council is an association of processors and distributors. At the present time I am handling frozen poultry and dairy products. I told you I have collaborated with the author on several articles in regard to transportation of frozen commodities and it appeared in a magazine called Food Freezing Magazine, a trade journal.

Mr. Welsh: I have attempted to draw on the board, Mr. Belyea, a primitive form of a refrigerator car. I have indicated the doorway opened, the two doors on either side; the bunkers on the extreme end of the car and a representation of the vents and plugs. The dotted line underneath the vents and plugs from the wheels to the top of the car are to represent the bunkers. Now, if you will take the piece of chalk I have in my hand and indicate where you found the wet cartons I shall appreciate it.

Witness: I will illustrate by indicating a line here as the top of the load. The cartons, of course, were staggered somewhat.

(Testimony of Jack Belyea.)

Mr. Welsh: The witness has indicated cartons in the doorway half of the way from the floor to the top of the doorway.

The Witness: Now, on the bottom here, to add a little bit to counsel's diagram, are the floor racks which allow for the bottom circulation. The wet cartons upon opening the door were found on that edge. They were found on both edges of the doorway. The thermometer was placed to the right hand side halfway between the door and the bunker. One case was lifted up out of the center of the load and used as a stand or brace to stand the thermometer up against. The thermometer was placed halfway between the door and the bunker. I got the thermometer from a concern by the name of Marshall and Anderson Company. I have had considerable experience along the lines of refrigeration. [24]

Q. Had you been able to get that whole carload of shrimp creole frozen in the warehouse, a cold storage warehouse in Los Angeles, is it your opinion that there would not have been any damage to those cartons?

Mr. Allen: Just a second. I will object to that. This witness has not been qualified as an expert on perishable foods or the condition nor has there been a sufficient foundation laid, nor sufficient facts in the hypothetical question to determine whether he could ascertain what would happen to that food.

The Court: Objection overruled.

The Witness: Well, that is a rather hard question to answer. Providing that the cold storage

(Testimony of Jack Belyea.)

warehouse would have accepted the merchandise.

Q. Well, let us further assume that the cold storage warehouse would have accepted the merchandise. Now, can you answer the question.

The Witness: Well, between 25 and 40 cases were in very, very doubtful condition.

Q. And as to the rest of the car?

The Witness: I believe those could possibly have been saved. I did in fact make an attempt to get the whole carload, with perhaps the exception of 25 to 30 cases, into cold storage. It was my thought that if I had been successful in doing so that the cartons probably would have been saved—that is the shrimp would probably not have been damaged. I have seen refrigerator cars come in stripped. Most cars don't have permanent stripping racks in them. I have seen a few that have, but most of them, the racks have to be put in at the time of shipment. They have to be put in by whoever is loading the car or is responsible for the loading of it. They will take approximately a strip one by three or possibly one by four and will nail it to the walls periodically along the side, approximately, oh, anywhere from a foot to 18 inches apart and will cross them—make a [25] sort of lattice work out of it. In the first place the strips are in vertically and are nailed across horizontally—the strips—other strips are nailed across horizontally to create a kind of checkerboard affair or lattice effect. The purpose of stripping is to prevent the commodity or lading in the car from touching the sides of the car. It per-

(Testimony of Jack Belyea.)

mits a certain amount of air circulation throughout the car. The sun beats down on a car if it is spotted. The sun strikes the outside of the car. In the absence of perfect insulation some of that heat may be transmuted from the outside of the car to the inside of the car. The stripping helps to prevent that heat from actually penetrating the commodity.

Q. Is it not your opinion, Mr. Belyea, that had this car—this car numbered ERDX-2667 containing the commodities which are now—which is the subject matter of this lawsuit, been stripped there would have been less probability of damage upon arrival.

Mr. Allen: Just a second. I will object to that, if your Honor please, as calling for a highly questionable and certainly speculative answer at most.

The Court: It actually goes to the weight of his testimony. He may answer the question.

The Witness: My experience in handling cars, the transportation of frozen and perishable commodities, I have found instances where cars were not stripped that came through in good condition and I have found cars that were stripped that came through in the same condition. However, if you have asked my opinion on it I would prefer a stripped car. And in fact any cars at present that are loaded out of our establishment I see that they are stripped before they leave. However, we do have cars come in that are not stripped and have a very, very low claim ratio. But it is my experience that a car is preferably stripped. When frozen

(Testimony of Jack Belyea.)

commodities go out and the loading of the car is under my control I see to it that they are stripped. When I was operating my refrigerator trucking business [26] I had from five to seven trucks. They were trailers and tractors. I had five to seven trailers and five to seven tractors. Most of the trailers were stripped, particularly on the long hauls. Anything which was used for hauling over 100 miles was stripped. I had two types of refrigeration mechanism on the trailers. On the shorter haul trucks we used just straight dry ice. In the longer haul equipment we used dry ice in a combination with gasoline motor and electric generator to operate a series of blowers that would pass a current of air by the blocks of dry ice and agitate the circulation of the refrigeration throughout the commodity. On the truck that left Los Angeles with the shrimp, we used a truck that had refrigeration equipment on it. We had equipment on it besides the dry ice. It *we* mechanical refrigeration. The mechanical refrigeration was run by a gasoline motor that operated the generator and was a five horsepower motor and the electric generator which it converted the direct current through was one and a half horsepower. While the truck would travel through such an area as the San Joaquin Valley in April, I could maintain the temperature that was in the commodity in the time of loading. If I put a commodity in the truck which was 80 degrees Fahrenheit at the point of origin there would be a reduction of temperature, but where the temperature of the

(Testimony of Jack Belyea.)

commodity was around anywhere from zero to 15 degrees above I could maintain the temperature that was in the commodity at that time. If the temperature of the commodity was 25 degrees when I put it in the truck, by increasing the amount of dry ice on it, putting it in direct contact with the product, providing enough was used, with the circulation, I could probably pull it down 15 degrees.

Q. If the commodity was 54 degrees, how long could you pull it down to, using both dry ice—how low could you pull it down to using dry ice and refrigeration as you used in this case? In other words, if we assume that some of the cartons you loaded into your truck were 54 degrees and assuming further that you put in the [27] amount of dry ice which you did put in and the amount of mechanical refrigeration that you used, what could you bring the commodity temperature down to or would you merely maintain it at 54 degrees?

The Witness: Well, it would drop down some, depending upon the amount of dry ice in that truck. In that particular instance we had 2500 pounds. We could pull it down to approximately around 20 degrees. We could bring it down an additional 20 degrees, to approximately 32 or 34, somewhere in that neighborhood. I don't think that the cartons would be hard upon arrival in San Francisco if they were soft upon departure from Los Angeles. The cartons that were in the car would remain soft all the way. If I remember correctly, the exceptions that were taken on the bills, I believe it was on

(Testimony of Jack Belyea.)

them—they took a blanket exception on the whole amount that went into the Merchants Ice and Cold Storage, and if I recall the statement was made that there were approximately 40 cartons soft, but they were dubious of the shipment and took an exception on the whole total amount of cases.

Q. In other words, because there was 40 cartons that were soft on arrival in San Francisco, the cold storage warehouse there refused to take the whole shipment of 400 some odd cartons, is that right?

Mr. Allen: Just a second. I will object to that as asking this witness's conclusion.

The Court: He is asking if it did occur. He didn't ask for a conclusion. He asked him does he know whether that was done or not.

Mr. Allen: That isn't the way the question was asked. May we have the question read, your Honor?

The Court: Read the question.

(Question read.)

Mr. Allen: If he knows.

The Court: That is a direct question. The objection is overruled. [28]

The Witness: Well, Mr. Burt, who is Gouley and Burcham's representative in their San Francisco office, apparently was notified by Merchants Ice and Cold Storage that they did not want to accept the shipment and upon talking to Mr. Burt, after he had made the inspections he clearly stated to me that some cartons in the load were soft and right next to that particular soft carton would be one that was hard and in a suitable frozen condi-

(Testimony of Jack Belyea.)

tion, but due to the commodity being [28A] perishable to the extent that it was, Merchants felt that they did not want the responsibility of receiving that in and taking only an exception to that specified amount of cases. I didn't happen to be in San Francisco at the time when the truck arrived. All I have is the information conveyed to me by my employee who happened to be on the truck making the delivery.

Mr. Allen: Just a second. I move all that be stricken on the ground it is hearsay.

The Court: It is hearsay at the present time.

The Witness: I owned the truck. It was my company that carried the lading from car No. 2667 to Bakersfield and San Francisco and other points, if any. They were my employees who drove the trucks. There were reports that came to me in the regular course of business as to the condition of the lading that I am testifying to.

The Court: Objection overruled. It wouldn't make the evidence inadmissible. It goes to the weight of the evidence.

Mr. Welsh: Please tell me, Mr. Belyea, where you received the information which you just recently testified to as to the Merchants Ice and Cold Storage reaction to the car, to the truck load when it arrived up north.

The Witness: Well, from two sources. One was the driver that made the delivery and one was Mr. Burt who was the agent for Gouley-Burcham Company.

(Testimony of Jack Belyea.)

Mr. Allen: I renew the objection. The conversation by the man who received the merchandise, the report made to his agent is hearsay and what his agent might report to him, that is another matter again.

The Court: You are correct on that.

Mr. Welsh: He received the information.

The Court: He received it from somebody other than his agent.

Mr. Welsh: He received it from his agent, too.

The Court: The court has ruled. The report he received from his agent is permissible, but not reports received from other parties who were not his agents. That is the ruling of the court.

Mr. Welsh: Please tell me, Mr. Belyea, only what information you received from your agent, namely, the truck driver, concerning the attitude of the Merchants Ice & Cold Storage Company in San Francisco toward taking the shipment into their warehouse? Only what information you received from your agent, the truck driver.

The Witness: He told me that Merchants would not accept the merchandise by only taking exception on some of the soft cases. There were approximately forty soft cases and the only way that they would accept the merchandise was to take exception on the total amount of cases. I remember that I first went down to the Bay Street team track to look at Car ERDX 2667 on the afternoon of the 10th or the 11th and I wouldn't swear to the day

(Testimony of Jack Belyea.)

I wouldn't know whether it was the 10th or the 11th, whatever day was Thursday. Thursday seems to spring in my mind. The following day the first 500 cases had to be unloaded that night at Bakersfield and I contacted the consignee in Bakersfield to be sure they would receive it. It is not possible that I went down to look at the car on the 10th which was a Wednesday and unloaded the car on the 11th which was a Thursday. The car was unloaded the same day that I got the first look at the merchandise. My employees accompanied me when I went down to the car for the first time. They were standing by ready to go to work. They were right there with me. There was no representative from the railroad with me. I had to go up to the office or send up to the office after him. The car was opened before Ned Holman got there. I broke the seal. It is not customary for me to break the seal on the car without getting permission first. I had already signed for the car. I signed a freight delivery receipt. I had a copy of the freight delivery receipt but I do not have it with me.

(The freight receipt was marked Defendant's Exhibit A for identification.)

The distance traveled from the time I unloaded the shrimp here in question from [30] the car until it was delivered to the plaintiff is as follows: The first 450 cases moved approximately three-quarters of a mile. The other 50 cases that came off in Los Angeles moved approximately four miles. My name appears on Defendants' Exhibit A for identifica-

(Testimony of Jack Belyea.)

tion. That is my signature. That is the freight receipt to which I referred. I signed it prior to the time I looked at the lading in the car. The receipt is not in the same condition as it was on the day that I signed it. There is an addition here. When I say there is an addition here, I refer to the words "No exceptions reported." Those words were not there when I signed it. Other than that, everything else is as it was when I signed it. At that time I was operating both as a common carrier and a contract carrier. At the time I had a certificate granted by the Interstate Commerce Commission. It was a wartime measure. It gave me also intrastate rights in the State of California. I could run to all points within the State of California if I recall the scope of the certificate. I was regulated by both the Public Utilities Commission of the State of California which is probably the railroad commission and also by the Interstate Commerce Commission of the United States. I was required to keep certain records under the regulations of those two commissions. I believe that I should have records to indicate the day I picked up the commodities contained in car ERDX-2667. Our carriage commenced in Los Angeles. I imagine I have records available telling the date upon which I picked up the lading that was contained in that car. I do not have those records with me at present. It is customary for me to refuse a shipment if it is in bad order as one might say, but under the circum-

(Testimony of Jack Belyea.)

stances where the time element was involved, for the best interests of everyone concerned, the object was to expedite the movement of that merchandise to where it wouldn't only protect Hamilton Foods, but it would protect the Santa Fe and also myself. I was aware of my duties to the public as a common carrier at that time. I recognized the responsibility I took upon myself [31] when I put a load of commodities in my truck. It is my testimony that I did not give any of the soft cartons to Mr. Dominis of Pic'N'Time. He got no soft cartons whatsoever. He got only hard cartons. I put some of the soft cartons in my truck. In other words you took it upon yourself to bear that responsibility.

Mr. Allen: Just a second. I will object to that as placing a legal or calling for a legal conclusion.

The Court: Sustained. That is carying it too far.

The Witness: The fact is that I did put some of the soft cartons in my car. As to the rest of them, Gaydens, Incorporated, got a few soft cartons in their 50-case shipment. I would estimate that there were between 25 and 40 cartons that were offff condition at the time. The balance of the car gave signs of breaking down. You could see a condition of defrosting starting to take place in all of it. Mainly I saw the soft cartons near the doorway. Ice bunkers in a refrigerated car are at the two extreme ends as you have pictured here. In the particular type of car you have pictured that is

(Testimony of Jack Belyea.)

correct. There are other types of bunkers. It is also true that no matter how well a door may be insulaed, it is the weakest portion of a wall and it would be the weakest portion of a side of a car. The icy refrigerant that emanates from the bunkers goes from the two extreme ends toward the center and meets around the door, the two currents. The air temperature around the door would be higher—it would be cooler as you dropped toward the bunkers and warmer as you got near the door.

Q. Isn't it pretty common when you open up a refrigerator car that has come all the way from Chicago to Los Angeles, that around the doorway there is a sign of some defrosting?

The Witness: Not necessarily.

Q. Well, it happens, doesn't it, with some regularity?

The Witness: I have seen it on a few occasions.

Q. And the fact that it is beginning to defrost does not [32] indicate that it is rotten or spoiled, does it?

The Witness: Well, it all depends on the condition of the defrosting. There is difference in opinions as to the difference between a defrosted case and one that is already wet.

Q. I understand your testimony was, I believe, that you could put your finger through them?

The Witness: That is right.

Q. But if they were just a little defrosted that

(Testimony of Jack Belyea.)

wouldn't indicate that the lading was in bad shape would it?

The Witness: No, it would indicate that it was starting to break down.

Q. But if it were put right under refrigeration in all likelihood there would be no danger of damage, isn't that right.

Mr. Allen: Just a second, if your Honor please. This witness has not been qualified as an expert on this particular food, as to what damage would happen and whether or not the placing of it under immediate freezing would or would not correct the condition.

The Court: Objection sustained. That is calling for an opinion and he has not been qualified to express an opinion.

The Witness: The question of whether signs of defrosting indicate whether or not the lading has been damaged depends upon the commodity. Some are more perishable than others. I have tasted shrimp creole. I would be inclined to handle shrimp creole a little more carefully than some other items

Q. You think it may be a little more perishable?

The Witness: Well, there have been very little of it in this town. Until you know how much abuse the commodity would stand I would certainly give it the utmost of my attention to see that it properly got there in the right condition.

Q. Did you receive any complaint from anyone

(Testimony of Jack Belyea.)

in Los Angeles to whom you delivered the cartons of this frozen shrimp?

The Witness: From Gaydens I had heard some reports on the [33] matter, that there were some soft packages and they objected to it. They did not file a claim. They objected to putting the merchandise out to the trade, re-freezing it and putting it out. They were dubious about the condition. They filed no claim because they didn't get too many packages of it and they didn't feel it was such a substantial amount that would warrant filing a claim. They found actual damage in the commodity itself. I am basing my statements upon what they told me. I got the thermometer from Marshall-Anderson Company. They are located about a block away from the Team Track. The thermometer is 12 inches long. 12 or 14 inches. I got it from the man in charge of Marshall-Anderson. It was a regular Fahrenheit thermometer. He went into their vegetable cooler and got it, got the thermometer. I didn't make any test on the thermometer. I assumed of course that it was a proper thermometer. It was operating and it was in a cooler at the time. I made no specific test as to its degree of accuracy. I testified that I stuck my finger through one of the cartons. One of them was broken after I opened the door and made the inspection. It is true that in any refrigerated place, whether it be an icebox, a truck or a railroad refrigerator car that the lading may be colder than the air sur-

(Testimony of Jack Belyea.)

rounding it. I had already put a hole in one of the cartons, but I didn't put the thermometer right into the lading because it wasn't that kind of a thermometer. The thermometer had a wooden stand on the back where the graduations were, a plaque, or whatever you care to refer to it as, and if I had put that in it would have meant putting a hole through the cartons of approximately that wide. Rather than put a hole through the carton that wide I took the air temperature above and the air temperature below. My truck left Los Angeles for points north with the lading that arrived on Car ERDX-2667, the same night it was loaded. I believe that my car with the lading from Car ERDX-2667 arrived in San Francisco on Saturday morning. It was the Saturday after the Thursday. It stopped en route at [34] Bakersfield and Sacramento. If I recall, I believe those were the only two stops. It went from Bakersfield up to Sacramento and went back down to San Francisco. We left 50 cartons off at Bakersfield. They left some at Sacramento. I don't recall. It was a small amount. The route was up the San Joaquin Valley I believe it was Highway No. 99. It would be a route that would be directly from Bakersfield to Sacramento. I added dry ice as the truck went up north because, if I recall, it got in too late, into San Francisco, to unload and I believe the truck returned down to San Jose where he could secure dry ice. There wasn't any in San Francisco at the

(Testimony of Jack Belyea.)

time and he returned down to San Jose to get sufficient ice to re-ice the commodity to insure the arrival of it. I believe that Saturday, April 13, the truck having made two stops, at Bakersfield and Sacramento, the car was tendered to the storage people for unloading. It was just overnight up there having made the two stops. I believe the car was tendered to the storage people for unloading on Saturday, the 13th. I haven't any idea of what time it was. I have records on all of these different things, but I didn't bring them with me. I believe it was Saturday morning, the 13th, that they refused to accept the carload of frozen shrimp.

Q. Then what, if anything, did your men do after the Merchants Ice & Cold Storage Company refused to take in the lading?

The Witness: I know that my men re-iced it because I have the bill to support that, in San Jose. Merchants finally accepted it by taking an exception on the commodity. I don't remember what date it was. I don't recall when the truckload of shrimp in San Francisco was actually unloaded into some warehouse. It is almost two years ago. I would have to check my records to state that. It is my testimony, however, that the Merchants Ice & Cold Storage Company wouldn't accept it until they cleared themselves by stating they refused to accept responsibility for it. In other words, putting an exception on the receipt, and my question was then, [35] "could that have been the day which

(Testimony of Jack Belyea.)

they received the goods and the day that they placed their notice of exception on the receipt on April 17th?"

Mr. Allen: The witness has already testified as to that. I will object to that. The witness has just testified that he cannot remember the exact date.

The Court: He can answer the question he is asked about the two dates.

Mr. Allen: I object to that on the ground that it is calling for a hypothetical question. He is asking could it have been. He is not asking for a positive statement of what happened. He says, 'Could it have been?' Well, it could have and it could not have.

The Court: Yes, objection sustained. The question is, what was done?

The Witness: I acted on behalf of the consignee, Gouley-Burcham Company, in unloading the car. Mr. Lloyd J. Smith gave me authority on behalf of Gouley-Burcham Company. He is no longer there but at the time he was in charge of the frozen food division of Gouley-Burcham. I do not recall ever writing a letter to Santa Fe Railroad Company and telling them that I was representing Gouley-Burcham Company in connection with this car. I didn't have any knowledge of whether or not Gouley-Burcham Company ever wrote such a letter to the Santa Fe Railroad Company.

Q. What financial arrangements did you have if any, with the shippers, Hamilton Foods Com-

(Testimony of Jack Belyea.)

pany, or the consignee, Gouley-Burcham Company

Mr. Allen: Just a second. I will object as being wholly immaterial and irrelevant. It has nothing to do with the issues of this case, whether he was paid \$1.00 or \$1,000.00. It wouldn't be material at all.

Mr. Welsh: I don't want to know how much he received, but I want to know whether he was paid only for his services as a common [36] carrier or whether he was also paid for performing services as an agent.

The Court: You may answer the question.

The Witness: I was paid for performing the services of a common carrier and none for services as an agent. I stated on direct examination that the bunkers were half-full of ice when I examined them. I recall having a conversation with you over the telephone the other day.

Q. And did I understand you correctly when you said that you thought the bunkers were three-quarters full of ice upon examination?

A. Between half and three-quarters, yes. They were not full.

Q. Not full.

A. No. The best way to describe how the car was unloaded would be to draw it on the board. There were two positions. We loaded the front piece of equipment through the side door. There is a side door in the side of the truck, a small opening, and we pulled the equipment up where we got

(Testimony of Jack Belyea.)

back past the door. We moved the equipment up and loaded it through the back door. The refrigerator doors on the railroad car were necessarily always open during a loading operation. I would say it took us 40 to 45 minutes to load the truck that went up north. If I recall, it was between two and two-thirty in the afternoon that we started to load. I know there was a lapse of time between moving the merchandise that was destined for Los Angeles—there was a lapse of time in which the car was shut up and waiting arrival of the line haul truck to transport the balance that was in the car. We had either three or four men working and loading the truck. I did have some kind of device or facilities to load the truck. We used conveyor rollers there at the start and until we had to make a curve and then not having a curve we had to place a man in between the sections of the rollers to throw the [37] cartons from one roller onto the other. We did not take the lading out of the car onto a dock and then from the dock onto the truck. Absolutely not. It went directly from the car onto the truck. I would estimate it took about 45 minutes if I recall correctly—it was 40 to 45 minutes. I did not request the railroad company or any employee of the railroad company to further [37A] ice the bunkers in the car when I first examined the car. I did have a conversation with Mr. Holman concerning the ice in the bunkers. I mentioned that the car was quite warm and that there

(Testimony of Jack Belyea.)

was something radically wrong; that we shouldn't have a temperature like that. After I initially examined the car, I got Mr. Dominis and he agreed to take the hard cartons. After the truck was loaded, on Thursday, the 11th of April, the truck headed north for Bakersfield, Sacramento and San Francisco. The other merchandise in the truck besides the shrimp from the car was cauliflower and broccoli. The cauliflower and broccoli were going to Sacramento. There was shrimp creole also destined for Sacramento. I don't recall what else the truck may have had, but I believe that the cauliflower and broccoli were the extent of it. That pretty nearly made a truck load. I don't know what tariff we were operating under. It may have been Highway Common Carrier Tariff No. 2, but I don't recall. Yes, it was Highway Carrier Tariff No. 2. On direct examination I testified that I had four inches of spun glass insulation. It was located in the sides of the equipment and there was six inches of cork in the floor and six inches of spun glass in the roof. Cork in the floor and spun glass in the roof and spun glass in the sides. The doorways were insulated the same way. That was the only insulation excepting that there were various racks and so forth. By racks, I mean stripping built on the floor and on the sides. That is the same kind of stripping we were talking about before. I believe the car was spotted on the 10th of April, but I know it was the afternoon of either the 10th or

(Testimony of Jack Belyea.)

the 11th, I don't know which day it was, I still can't recall whether it was the 10th or the 11th. The shrimp creole itself was not actually examined in Los Angeles to determine whether or not it was fit for human consumption. There were no samples submitted to any laboratory or the United States Department of Agriculture to determine whether they were or were not. To my knowledge there were no [38] claims made by the Los Angeles consignees. I didn't call for an inspector from the United States Department of Agriculture when I opened the car door because we were working against time.

Q. But you are aware of the practice of calling such an inspector when one feels that a car did not arrive in proper condition.

Mr. Allen: Just a second. I object to that as being argumentative.

The Court: He is asking whether he is aware of the custom.

Mr. Welsh: Business practice.

The Court: Go ahead. Objection overruled.

Mr. Welsh: You are aware of that custom, aren't you, sir?

The Witness: It all depends on whether it comes under the jurisdiction of the United States Department of Agriculture. I know of the perishable freight inspection agency that the railroad has. I know it is a business custom to ask for an inspection by those people where there is any doubt

(Testimony of Jack Belyea.)

as to the lading at destination. I asked Mr. Holman to call for an inspector, for an inspection, and never got an inspector down there. I asked Mr. Holman for a mechanical inspection, also an inspection of the merchandise in the car. I would say that I made such request between 30 and 40 minutes after we found the initial—after the initial opening of the car. We did not get such an inspection. That very same evening we put the lading on our truck so as to save time and the possibility of losing it. When I looked at the car the first time upon arriving, at the team track, the seals were on the car. I don't recall the numbers of those seals. I don't remember if the letters "F.M.C." were on the seals, but I believe they were. It wasn't a regular Santa Fe or Chicago, Milwaukee, St. Paul seal. It looked like a seal of someone besides the railroad. First, upon arrival at the perishable Team Track, I went to Ned Holman's office, signed the freight delivery receipt, Exhibit A for identification, and after signing that document [39] went down to the track to the car itself. I opened up the car, looked at it and sent for Ned Holman when I saw the soft packages in the doorway. I signed for the car before I looked at it. You have to. That is the procedure that is followed. You don't get to open the car until you sign for it.

(Testimony of Jack Belyea.)

(Trial resumed following day.)

Upon checking my records last evening, I find that 100 cases were consigned to Gaydens, 450 cases to Dominis, or a total of 550 cases in Los Angeles.

Q. And of those 100 cases to Gaydens, I believe you testified that they were representative cases of the whole carload. In other words, some of the soft cases were in that group?

A. There were a few, yes. I have examined my own records and I am definitely certain that I first went down to the Team Track to look at the railroad car on the 11th of April. I have two of the freight bills. However, the three in question, in San Francisco, my attorney has them and I was unable to secure them for this morning. I do not have the records as to the delivery in San Francisco. Mr. Gold has them.

Redirect Examination

By Mr. Allen:

My truck returned from San Francisco during the following week, but I wouldn't know the exact date. It picked up merchandise on the way back. The other merchandise which was in my truck that went to Sacramento and Bakersfield and Fresno and San Francisco arrived in those cities in good condition.

Mr. Welsh: What do you mean by "other merchandise?"

Mr. Allen: You brought out on cross-examina-

(Testimony of Jack Belyea.)

tion yesterday, Mr. Welsh, about the broccoli and cauliflower.

Mr. Welsh: Oh, you mean the broccoli and cauliflower.

Mr. Allen: That is right, the other merchandise carried in his truck.

Mr. Welsh: I don't see how that is relevant to this case, your [40] Honor, and I object to it on that ground.

The Court: Objection sustained.

Mr. Allen: The materiality is this. If the other merchandise, perishable merchandise carried in this same truck, went to San [40A] Francisco and Sacramento and arrived in the same truck in good condition then we can throw out all the testimony as to how hot the San Joaquin Valley was.

The Court: If it is for that purpose I will allow him to answer.

The Witness: Yes; it was received in good condition at Bakersfield and Sacramento.

Mr. Allen: Mr. Welsh asked you or implied that the purpose of your taking this merchandise in the condition you found it was due to the fact that you wanted to save some time. Will you tell the Court at this time why you moved this merchandise from the freight car in that condition?

The Witness: Well, there was no other place to put it. I couldn't leave it in the car. There was no storage available. I couldn't leave it set there and rot. So the reason that I moved this merchandise

(Testimony of Jack Belyea.)

from the car was not the saving of time but was for the purpose of avoiding the merchandise from spoiling right there in the car, not having any place to move it. And because of that, I took it upon myself to move this merchandise which would go completely to waste and tried to save what I could. Mr. Holman did not get a thermometer of his own. Mr. Holman did not punch a hole through the package nor did he push the thermometer into the package to see what the temperature of the merchandise in the package was. To my knowledge, at no time did Mr. Holman question the accuracy of the thermometer. I received money for hauling the merchandise in Los Angeles and I received payment on the merchandise that went to Sacramento, but I received no payment for the merchandise that went to Bakersfield or the various consignees in San Francisco. To this day I have not been paid for the hauling of the merchandise to Bakersfield or San Francisco. I would consider the boards on which the merchandise was stacked as stripping. There was ventilation underneath the merchandise. I [41] believe the merchandise in the car was stacked three high throughout the car. It might have been four high on the bunker ends. I would say the packages were probably 14 by 14 and from eight to ten inches high. The packages being eight to ten inches high and this merchandise being stacked three boxes or four tiers high on the outside, I would estimate that it was three to three

(Testimony of Jack Belyea.)

and one-half feet in height. The rest of the car was empty. I believe that the car is eight feet high inside. Five of the eight feet was ventilation space. The purpose of stripping a car is when a car is filled it can get some circulation through the car, that is, where it is solidly packed, they put these strips along the wall to permit air to get around the packages.

Q. But in this particular car almost the entire car or at least two-thirds of the car was empty and had available space for ventilation, isn't that correct?

Mr. Welsh: Your Honor, we object to the leading question on redirect examination.

The Court: Sustained.

Mr. Allen: If your Honor please, this witness is not our witness. He is called under the rule of cross-examination which apply to a defendant called under the rule. We have not made him our witness. He is a party defendant and he is being examined under the rule, and the rule of cross-examination applies to a witness called under the rule.

The Court: He may answer.

The Witness: It is a matter of opinion. I feel that it should be stripped as a reassurance that it would get proper ventilation. There was ventilation in all the rest, of the top of the car. The only question involved would be the three feet, or three feet some inches from the top of the packages to

(Testimony of Jack Belyea.)

the floor. Underneath the packages it was stripped. Those are permanent floor racks. [42]

TESTIMONY OF ALICE EDDELMANN
on behalf of the Plaintiff.

Direct Examination

By Albert H. Allen:

My name is Alice Eddelmann. I have charge of all the accounting and records of the Gouley-Burcham Company, who are food brokers. They were the consignees of the merchandise involved in this lawsuit. We received four or five carloads of merchandise from the Hamilton Foods Company. Not less than four. All of them came in good condition except this one. To my knowledge we did not receive any formal written notice from the Santa Fe Railway Company as to the arrival of this car. The way we keep our records the card would be in this file if we received one. I have all of the 1946 records and I have gone through all of those records but have been unable to find that card. I received only one card on all of the shipments we received. Sometimes we receive notification by telephone from Santa Fe that the car is arriving. But not in this particular instance because we have cars coming in from all over the country and we have offices in different places and if it is a stopover car sometimes they call and give us the information where the car is so we can notify our offices, so they can arrange for warehouse storage space. Our business practice is that when we have notice that a car

(Testimony of Alice Eddelmann.)

of perishable foods is coming in the packer usually sends us a wire giving us the shipping date, the car number, and so forth, as the food storage space is very limited here and it is hard to get space, so we have to make arrangements for storage space, if it is going into storage. If it is directly shipped from the car, we contact frozen food trucks and they follow through when it arrives here, so they can unload it immediately. We request the truck that is to carry the merchandise further to contact the railroad company to find out when the car is going to arrive and we also, if it goes in storage, we contact the warehouse and they follow through. In this case we received a telegram that the merchandise was being [43] shipped. The telegram was dated April 1, 1946 and we received it at 10:30 a.m. in the morning. It concerned Car ERDX 2667. This is the time when the telegram was sent. There is a difference in time so it gets here before it is sent, really. That is when it arrived at our office. It was sent from Chicago at 11:04 a.m. and it reached us at 10:30 a.m. It reads: "Car ERDX 2667, Santa Fe, shipped April 1st," and signed "Hamilton Foods, Incorporated." I didn't notify Mr. Belyea, but Mr. Smith, who was in charge of our office at the time, in charge of our frozen food department, called him on the telephone advising him to look out for the car. That is our usual procedure as soon as we get the telegram, to follow through on that.

(Testimony of Alice Eddelmann.)

Cross Examination

By Mr. Welsh:

(Defendant's Exhibit B was then marked for identification.)

The Witness: I do not remember receiving the copy of Defendant's Exhibit B. This exhibit indicates that it is a notice sent to Gouley-Burcham Company, 1848 East Vernon Avenue, indicating that Car No. ERDX 2667 is at the Bay Street Team Track. I received only one card and that was on Car No. 7979 and that is the only card of all the cars that have been shipped. We always attach the cards to the order in the order that they are received. They send us a telegram and then we get the card and put it right in the file, right with the thing. It may have been lost in the mail but to my knowledge I never received it. And here is where we called Jack Belyea. That is on the one car. We always mark the record accordingly because of the perishable merchandise. I do not remember whether we were notified by telephone by Santa Fe about the car, unless they talked to Mr. Smith and I said before, he left us almost two years ago. They may have spoken to Mr. Smith rather than myself, but I usually take all those calls, but if I should be out to lunch or something they may have talked to him. I don't know of any call. [44]

TESTIMONY OF RAYMOND C. SPOELSTRA
a witness on behalf of the Plaintiff.

Direct Examination

By Albert H. Allen:

I am part owner of the Food Service Laboratory, which is the laboratory set up to do analytical work for food processors, chemical and bacteriological. I graduated from the University of Colorado and did post graduate work at the University of Chicago, in 1934. I received a Bachelor of Science Degree from the University of Colorado and did post graduate work at the University of Chicago. I did not receive a degree although I did two years of post graduate work at the University of Chicago. It consisted of bacteriological work and chemical analyses. Since my post graduate work at the University of Chicago, I have been engaged as a chemist and analyst of frozen food products. I maintain my offices at 4917 Huntington Drive. I am familiar with frozen food products. I never made an analysis of frozen shrimp creole, but I have made an analysis of frozen shrimp. There is no difference between frozen shrimp creole and frozen shrimp as to the perishability of the commodity. From my experience and my analysis, we recommend to our clients, that frozen shrimp, or frozen shrimp creole, should be kept at negative 10 or below—that is 10 degrees below zero or less. Frozen shrimp cannot be kept at a temperature above 20 degrees above zero. Above 20 degrees it starts deteriorating. When you get

(Testimony of Raymond C. Spoelstra.)

over 20 degrees above zero, 25 degrees above zero, you are approaching a very dangerous situation as far as frozen shrimp are concerned. Frozen shrimp kept over 20 or 25 degrees above zero begins to defrost. After it begins to defrost there is a gradual deterioration of the product. That deterioration takes the form of possibly enzymatic action which is natural to the product or possibly bacterial action or some of the normal acids that are present in the fish may begin to work for a gradual breakdown of the product. When a package of shrimp creole appears soft and moist to the point where you can put [45] your finger into the carton, it indicates to me that the product is defrosted and with defrosting of the product it is either ready for immediate use or it is on its way to spoilage.

Q. Now, once a perishable food product, frozen food product such as shrimp creole reaches a temperature of, let us say of above 30 or 35 degrees and it has started to defrost, is it possible to re-freeze that food and still have it edible?

A. It is possible to do it but I question very much whether any processor would do it because they are running a terrific risk of putting a product onto the market that is going to be sub-standard.

Q. Now, when a product reaches a temperature of 54 degrees and appears to be soft and in a defrosted condition, can that be re-frozen?

A. It can be re-frozen. I mean—if I get your question correctly, do you mean whether or not it

(Testimony of Raymond C. Spoelstra.)

is possible to re-freeze such a product? If that is what you mean, the product can be re-frozen, but if you mean re-frozen for sale, again you are running a very great risk of having a substandard or a product that when it is finally sold to the consumer will be possibly off flavor or off odor.

Q. Now, is there any danger of poisoning from food which has been standing at 54 degrees and is subsequently re-frozen?

A. There is always danger of the possibility of bacteriological poisoning in any foods. The organisms that are usually responsible for that are staphylorphas. Now, if that organism happens to be present at that particular time, if the product defrosts, warms up, allows the organism to grow and to release its virus there is a very great possibility of poisoning from that organism. At the request of the plaintiff, I caused experiments to be made in the last few days with shrimp. An experiment was made with frozen shrimp. That was a blanched shrimp. Blanching is a process whereby the shrimp is heated to a certain temperature for a certain length of time. I [46] would say there is no difference as far as the defrosting between cooked shrimp product and a product that has been blanched. The experiment I made was as follows: I bought a package of shrimp and put it into the refrigerator. The refrigerator was at negative eight degrees Fahrenheit. I held it in the refrigerator at 40 degrees and at the end of 11 hours it had completely defrosted and it was just running out

(Testimony of Raymond C. Spoelstra.)

of the package. I also conducted an experiment at room temperature in which the product was at zero degrees and held at room temperature which was approximately 70 or 72 degrees and at the end of six hours it was completely defrosted and the juices were running from the package. At the end of six hours in a room of temperature 70 to 72 degrees and a package taken from a temperature of zero, it was running out of the package.

Voir Dire Examination

By Mr. Welsh:

Q. Have you had a great deal of experience with refrigerator cars on railroads?

A. Not with the actual refrigerator car, no.

Q. Do you know what temperatures are possible to be maintained in a car, over what period of time, given certain icing instructions that have been fully carried out?

A. We have seen records of recording graphs in cars that have been shipped from various points throughout the country and we know from having seen those graphs that it is possible to maintain certain temperatures in transit.

Q. Well, do you know how much 13,000 pounds of crushed ice with 30 percent salt—do you know what temperature that would keep the car at if that was maintained at every icing station along the way?

A. (No Answer).

Q. In other words, if 13,000 pounds were put in the bunkers in Chicago with 3,900 pounds of salt

(Testimony of Raymond C. Spoelstra.)

on April 1st at 2:15 p.m. and if 3,000 pounds of ice were put in at Savannah, Illinois, with 900 [47] pounds of salt on April 2nd at 5:00 p.m., and if 1,000 pounds of ice with 300 pounds of salt on April 4th at 1:40 a.m. at Kansas City, and 1,000 pounds of ice and 300 pounds of salt on April 4th at 2:05 p.m., in Kansas City were put in, and at Waynoka, 1500 pounds of ice and 450 pounds of salt on April 5th at 6:53 a.m., and at Clovis 600 pounds of ice and 180 pounds of salt on April 5th at 9:10 p.m. and at Belen 600 pounds of ice were put in and 180 pounds of salt on April 6th at 11:35 a.m.; at Winslow, Arizona, 900 pounds of ice and 270 pounds of salt were put in on April 7th at 8:45 a.m. and at Needles, California, 900 pounds of ice and 270 pounds of salt at 10:20 p.m. on April 7th, and at San Bernardino, on April 8th at 7:05 p.m., 1500 pounds of ice and 450 pounds of salt, and the car then came from San Bernardino into Los Angeles. Assuming further that upon arrival at Los Angeles the bunkers were 98 per cent full—

Mr. Allen: Just a second. Just a minute. You are assuming a bit of evidence that is not in the record. There has been no testimony that the bunkers were 98 per cent full. There isn't one iota in this record to include that in a hypothetical question.

Mr. Welsh: Well, the defendant hasn't put on his case yet.

The Court: You are assuming something not in evidence and you should assume no such thing.

(Testimony of Raymond C. Spoelstra.)

Mr. Welsh: Assuming the other facts I have given you. Do you feel that you are qualified to determine what temperatures would be maintained in that car and what the result of the temperature would be if the doors were opened—how fast the temperature would go down and various things of that sort?

A. I don't think that I can qualify as a refrigerator car expert but we do do this in our work. We make recommendations to our clients at which we like to have the cars held during transit and we know that if those temperatures are met that we will not run into any difficulty with our foods.

Q. But you wouldn't know from the questions that Mr. Allen put to [48] you how long the 54-degree temperature would be maintained from the facts that I have given you here, would you? In other words, you wouldn't know whether that 54-degree temperature had been present for five minutes, five hours or 50 hours, would you?

A. No, I couldn't state that definitely.

Mr. Welsh: Then we object to the question, your Honor. We don't feel that the gentleman is qualified to testify as to that particular point.

Mr. Allen: If your Honor please, we have not qualified nor do we propose to qualify this gentleman as an expert on refrigerator cars. The question went not to what temperature the car would be maintained at. That isn't the question. That is something for the defense to raise.

(Testimony of Raymond C. Spoelstra.)

What we want to know is, and what we have asked, and I think it is a perfectly proper question, assuming that the facts which have been introduced into evidence in this case so far were present and he found that the merchandise was at 54 degrees, whether that could be re-frozen to be used in the trade. Now, whether or not it was at 54 degrees for one hour or ten hours or what caused it to get that way is something else that we will argue when the defense puts on its case. All we want to know of this witness, and he is qualified to testify, if he finds a frozen food product at 54 degrees, whether it can be re-frozen for the trade.

Mr. Welsh: Is it your question that the product is as 54 degrees?

Mr. Allen: No, the temperature of the car.

Mr. Welsh: That is why I object, because there is no indication of what the temperature of the product is and the gentleman admits he is not an expert in determining how fast the temperature would raise, under what circumstances, and all of the assumptions that have been made are irrelevant.

But if Mr. Allen wants to ask him specific questions about the [48-A] commodity in a room temperature of 54 degrees for a certain period of time, we have no objection to that. We know the gentleman is completely qualified to answer a question of that sort.

Mr. Allen: We are merely asking him at this time, if your Honor please, that the condition in which the product was found, if that product could

(Testimony of Raymond C. Spoelstra.)

have been re-frozen and sold to the trade and he is qualified to testify on that point. He is an expert witness on that point and he has made experiments and he can testify.

Mr. Welsh: The air temperature was 54 and not the product, and one must know how long the commodity was exposed to the 54-degree temperature before being able to answer that question.

Mr. Allen: That is a question of the weight of the evidence and other testimony that the defense may put in, but I think it is a perfectly proper hypothetical question that took in every fact in this case.

The Court: Objection overruled. He may answer. It goes to the weight of his evidence, because counsel is relating what has been offered in evidence in his question.

What do you say to that?

The Witness: I am trying to remember the import of the question. May I have the last part of that question?

(Question read.)

Mr. Welsh: We object. He has not asked the witness whether or not he has an opinion, first.

Q. (By Mr. Allen): Do you have an opinion as to that?

A. It would be my opinion that the product should not be re-frozen.

The Court: Should not, but he asked you could

(Testimony of Raymond C. Spoelstra.)

it be and not whether it should not. The question is, could it be? That is your question.

Q. (By Mr. Allen): Could it be re-frozen and sold to the public [48B] as a first quality product?

A. I think not.

Mr. Allen: You may cross-examine.

Cross-Examination

By Mr. Welsh:

If a package of frozen shrimp taken below 25 degrees Fahrenheit was exposed to a temperature of 54 degrees for one minute the frozen [48C] shrimp would not be unsuitable for human consumption. If left there for five minutes it would not be unsuitable for human consumption. Left at a temperature of 54 degrees it would defrost in approximately 12 hours. That is completely defrost. At that time it is fit for human consumption, but if it had to be refrozen again, which might take another 24 hours, and then defrosted again, I would say it would not be fit for human consumption. The probability of refreezing it and it being fit for human consumption are against it. I never made any experiments with frozen shrimp creole that had already been cooked in a creole sauce. There is a chemical change of some sort that takes place in shrimp when it is thoroughly cooked from what it was before it was cooked. The chemical change that takes place after thorough cooking is not the same as the chemical change that takes place after blanching. The experiments I made on

(Testimony of Raymond C. Spoelstra.)

blanched shrimp is not on the identical type of shrimp which we are discussing in this lawsuit.

Mr. Welsh: Your Honor, I ask that the witness' testimony as to his experiments on blanched shrimp be stricken, inasmuch as they do not conform to the shrimp in this case. In other words, the experimental evidence—there is no showing that the chemical contents conform to the chemical content of the shrimp we have here.

Mr. Allen: I have gone into the question very thoroughly with the witness as to what the difference is between the two products, whether they are similar, whether the reaction is the same and whether the change in chemical reaction takes place on the frozen shrimp and this witness testified that they are identical. He testified that the effect of frosting and defrosting and freezing on a blanched shrimp would be the same as it would be on a shrimp creole.

The Court: What do you say as to that? Would they be the same?

The Witness: The actual overall effect would be the same. Now, the actual chemical change that takes place is a change in the protein of the shrimp. An uncooked protein is a little different than a cooked protein [49] but the overall effect is going to be very little as far as defrosting is concerned.

The Court: Motion overruled.

The Witness: As a matter of fact, the cooking of the product—once a product is cooked it is more

(Testimony of Raymond C. Spoelstra.)

predisposed to spoilage than an uncooked product

The Court: Motion overruled. Go ahead. The motion is denied.

(The bill of lading was then admitted in evidence as Plaintiff's Exhibit 5.)

(Defendant's Exhibit A was then admitted in evidence on offer by the plaintiff.)

Mr. Allen: We have stipulated as to the value of the product and so it will not be necessary to introduce any evidence on that point.

The plaintiff rests.

The Court: Very well.

(The defendant then had marked for identification the tariff regulations of the Interstate Commerce Commission which said exhibit was marked Defendant's Exhibit C for identification.)

The Court: Are you offering defendant's Exhibit C for identification in evidence?

Mr. Welsh: Yes, we will offer in evidence, your Honor.

The Court: It is admitted.

(Defendant's Exhibit C was then admitted in evidence.) [50]

TESTIMONY OF C. A. MULVIHILL
a witness on behalf of the defendant.

Direct Examination

By Mr. Welsh:

My name is C. A. Mulvihill and I am assistant manager of the Santa Fe Refrigerator Depart-

(Testimony of C. A. Mulvihill.)

ment. I have been assistant manager about a year and a quarter. The Santa Fe Refrigeration Department is a part of the Atchison, Topeka & Santa Fe Railway Company. I have been with Santa Fe since 1926. I was with the refrigeration department from 1926 to 1937 and then this last year and a quarter. The Coast Lines west of Albuquerque on the Santa Fe System are under my jurisdiction and in my territory as assistant manager. It includes the territory that Santa Fe serves west of Albuquerque, New Mexico, and including San Francisco. The employees in the refrigeration department on the Coast Lines are under my direct control and supervision. There are certain records that are kept in the ordinary course of business indicating the arrival of cars, the percentage of ice contained in the bunkers, and such information. I have the records with me indicating the arrival of car ERDX 2667 in Los Angeles on or about April 9, 1946. The record which I hold in my hand is the inspector's daily book, daily inspection book. The book contains a full record of the waybill reference under which each car is moving and a record of the inspection; the condition of the ice in the bunkers and the position of the vents and such. The employees who keep those records are under my control and direct supervision. During the time I have been with Santa Fe I have had experience in the examination of refrigerated cars. I have seen thousands of them. From the records I have in my

(Testimony of C. A. Mulvihill.)

hand now I can tell you that the records indicate the car ERDX 2667 arrived in Los Angeles and the date of its arrival. It arrived in C.S.X. That is the symbol for a train moving from Barstow California. It arrived at 3:40 a.m. on the 9th. The bunkers were inspected at that time. At that time the [51] bunkers indicated 98 per cent full. The next entry I have concerning the car ERDX 2667 is a carry over record from the business of the 9th to the business of the 10th. It shows the bunkers 85 per cent full at 8:00 a.m. on the 10th. The record indicates that the car at that time was on the Bay Street Team Track at 8:00 a.m. on the 10th. That means that at the time the bunkers were inspected at 8:00 a.m. on the 10th they were 85 per cent full of ice.

Cross-Examination

By Mr. Allen:

The entries made in the book which I was reading from were made by the inspector, the R. D. Inspectors. The records are made in that particular book at that particular time. They are not transposed onto that book from some other sheet of record. This book is a book of original record, and it is made by the man who makes the inspection. The record does not indicate at which particular spur track or which particular track of the Bay Street Team Track, Perishable Team Track the car was deposited. You could not tell from that

(Testimony of C. A. Mulvihill.)

record where on the Bay Street Team Perishable Track the car stood.

Redirect Examination

By Mr. Welsh:

There are no tracks on the Bay Street Team Track which are inaccessible to unloading by trucks. They are all available to access by trucks. A truck can back up to any one of the tracks and unload a car. The temperature around the door of the car would be a little bit higher than the temperature at the end of the car. The reason for this is that there is a break in the structure there, the normal insulation, and the car construction is broken there to give access to the interior through the doors and to the extent that that is broken then it is weaker in retaining the refrigerant than is the other section of the car. I am familiar with the customs and business practices of the railroad company and consignees when a car is [52] thought to be bad order or the contents thought to be in bad order by a consignee. As a rule, inspection is immediately demanded by an independent inspection service. In Los Angeles we use the Department of Agriculture to make an independent inspection. If a complaint is registered we also make our own inspection. I am familiar with the schedule which the Santa Fe maintains between Kansas City and Los Angeles, the time schedule to shippers. Our time schedule between Kansas City and Los Angeles is delivery the 6th morning, that is delivery to

(Testimony of C. A. Mulvihill.)

the shipper. That means if a car left Kansas City April 4th, it should be ready for the shipper on the 10th, the morning of the 10th.

Q. And are you familiar with the schedule we advertise for shipments to Chicago?

Mr. Allen: If your Honor please, I don't want to interrupt counsel's examination, but there is no dispute that the car arrived here within the period of time or even a shorter period of time.

The Court: Well, he has a right to question his witness whether there is a dispute or not.

Mr. Allen: We have stipulated the car did arrive in that period of time. There is no purpose in the stipulation if he is going to examine the witness about it.

Q. (By Mr. Welsh): How about delivery to the shippers? Is that stipulated to?

The Court: Go ahead.

Mr. Allen: No.

The Court: Go ahead and examine the witness.

The Court: You don't stipulate to everything.

Q. (By Mr. Welsh): When we make a connection at Kansas City with another road, such as the Milwaukee Road, what is the schedule we advertise to the shipper for delivery in Los Angeles from Chicago, via the Milwaukee Road to Kansas City and via Kansas City to Los Angeles? [53]

Mr. Allen: I object to that as immaterial and irrelevant and has nothing to do with the issues in this case—what they advertised.

(Testimony of C. A. Mulvihill.)

The Court: Overruled.

The Witness: Seventh morning. That means delivery on the seventh morning.

Q. When a car that left on April 2nd from Chicago would arrive, if it kept that advertised schedule, at what time in Los Angeles?

Mr. Allen: I object to that as being wholly immaterial and irrelevant and not within the issues of this case.

The Court: Objection overruled.

The Witness: On the morning of the 9th.

I know the regular icing stations along the Santa Fe route.

Mr. Allen: We stipulated that this car was iced at all the icing stations, all along the route, up to San Bernardino, and it is in the record and it has been signed and delivered and it is in evidence.

Mr. Welsh: Is Los Angeles a regular icing station, Mr. Mulvihill?

The Witness: On some traffic. Not on destination traffic if the bunkers are three-fourths full on arrival.

San Bernardino is a regular icing station. If a car has been iced in San Bernardino, ice is added in Los Angeles if, on arrival, the bunkers are less than three-fourths full, 75 per cent full, then they are re-iced here to capacity. During my experience with refrigeration, it has been necessary for me to use a thermometer. Thermometers must be given a reasonable amount of care and periodic check so

(Testimony of C. A. Mulvihill.)

they do reflect accurate temperatures. They are apt to be inaccurate if not periodically checked. When a door of a refrigerator car is opened, the refrigerant which represents cold air in the car, pours out of the car very readily. In warm weather it is visible in the form of a heavy fog descending out of the doorway. The outside temperature, the differential between the prevailing temperature outside and that inside would determine how rapidly the temperature of the car would be reduced if the car were 25 degrees above zero at the time the doors were opened. If we assume that the car was open on April 11th in the afternoon, when the high temperature was 88 degrees and the low temperature was 62 degrees and the temperature in the car was 25 degrees above zero before the doors were opened, the temperature would rise up rapidly, the air temperature within the car—the equalizing factor would be very rapid. The commodity temperature of the actual packages would not raise with the same speed. The loss of temperature would be very rapid. The loss of package temperature would be less rapid. There might be considerable difference between the package temperature and the air temperature if the doors were opened. When a car is unloaded at a team track into a truck and the truck is backed up to the car door and it takes 45 minutes to unload the car, the commodity temperature is appreciably increased in the package, but not a very material increase in temperature. [54]

(Testimony of C. A. Mulvihill.)

Q. I wish you would look at Exhibit A, attached to Plaintiff's Exhibit, which indicates the icing record given this car from Chicago and from your knowledge of refrigeration state if you can, whether that record shows proper handling from Chicago to Los Angeles.

Mr. Allen: We have admitted it does.

Mr. Welsh: Then you have admitted we have not been negligent in icing the car through San Bernardino, is that correct?

Mr. Allen: I did not say that. I said we admitted the icing record there—the icing is indicated by the record.

Mr. Welsh: He won't stipulate to lack of negligence so I don't see what is the matter with the question.

The Court: Objection overruled. You may answer.

The Witness: It looks like a fairly normal icing record.

Q. (By Mr. Welsh): Would that record indicate that the temperature being maintained in the car was good, bad, or high or what? How would you phrase it, sir?

A. I would say it was quite ordinary and quite average.

Q. It was the run of the mine?

A. At that time of the year the consumption was very normal.

(Testimony of C. A. Mulvihill.)

The Court: Between what points do you say that was?

The Witness: That was from Chicago to San Bernardino.

The Court: Go ahead.

Q. (By Mr. Welsh): On the record which you refer to do they indicate the condition of the bunkers and vents on April 10th? A. Yes, sir.

Q. And April 9th? A. Yes, sir.

Q. 1946?

A. Yes. The vents were closed and the plugs were in.

Q. On both dates? A. Yes, sir. [55]

Recross-Examination

By Mr. Allen:

You misunderstood me when I stated that there is no place at the Bay Street Perishable Team Track where cars are not available to the street for opening. I said that the Bay Street Team Track where cars are normally delivered are available to, accessible to trucks. There are lead tracks in there on which stuff is not delivered but are a part of the Bay Street facilities. It is a fact that at the Bay Street Team Track, where the street comes down here, there is one set of tracks, and then there is one set of tracks that comes to a termination and goes to a spur and another set of tracks which comes down on the other side and a third set of tracks which comes down on still the

(Testimony of C. A. Mulvihill.)

other side, so that the tracks on each outside are available for opening.

Q. So that it is possible to have a car on the Bay Street Team Track which is not available for trucks to unload, is that not correct?

Mr. Welsh: Please do not argue with the witness.

Mr. Allen: I am not arguing with the witness. I am asking him a question.

The Court: He may answer.

The Witness: I would say with the exception of the leads there that the facilities generally is available to trucks.

Mr. Allen: Mr. Mulvihill, I am not asking what is generally available. I am asking you if it is not possible to have a car on the inside track which is not available to unloading from either street. Is that not possible? A. It is possible.

Q. As a matter of fact, you have several such tracks, don't you? A. No, I don't believe so.

Q. How many down there do you have like that?

A. I can't say of my own knowledge.

Q. You have at least two, don't you?

A. It is possible. [55A]

Q. If I told you that I examined it last night and found that there were three such tracks would you say I was in error? A. No.

Mr. Welsh: That is pure argument, your Honor.

The Court: Objection sustained. It is argument.

Q. (By Mr. Allen): Now, if a refrigerator car

(Testimony of C. A. Mulvihill.)

were on the center track it would not be possible to unload that car from either side of the Bay Street Track, is that correct?

A. Well, I am afraid my knowledge of that center track that you have reference to there doesn't permit me to make a specific answer to the question.

Q. Would you make an examination at the noon hour? I would be very happy to go with you.

A. I would be glad to. I do not have the record of the inspection in San Bernardino and I do not know how full the ice in the bunkers were in San Bernardino, excepting that the record of the icing shows the amount of ice that was used in replenishing the bunkers.

Mr. Welsh: The record in evidence speaks for itself as to how much ice was put in at San Bernardino.

The Witness: We have no record of any ice that was added from the time the car left San Bernardino to the time it was unloaded in Los Angeles. The record does not indicate any ice being added to that car from the 8th of April until the 11th of April.

Q. How long would it take the temperature in a car that [56] had been properly iced up to San Bernardino to rise in temperature from 20 or 25 degrees to 54 degrees, assuming that the temperature, the outside temperature was a mean temperature of 58 degrees in Los Angeles and 54 degrees

(Testimony of C. A. Mulvihill.)

in San Bernardino on the 8th and 58 degrees in Los Angeles on the 9th and 68 degrees in Los Angeles on the 10th and 75 degrees in Los Angeles on the 11th?

The Witness: Well, I can't say specifically, but it would take quite a long time to rise to that temperature.

Q. In other words, the temperature does not just jump from 25 degrees to 54 degrees, does it?

The Witness: Not if your car is closed.

Q. So that if upon opening the car a thermometer was placed in the car and the thermometer registered 54 degrees you would say that it took some period of time before that temperature rose to 54 degrees, wouldn't you?

The Witness: That is right. If in addition to the thermometer being placed in the back of the car away from the door it was placed underneath the package and that indicated a temperature of 50 degrees, the temperature would reflect the temperature of the packages more than it would the air temperature. Putting the thermometer down in between the packages would not necessarily indicate that the packages were 50 degrees. To get the package temperature, you would have to insert the thermometer in the contents of the package. I don't know whether Mr. Holman has a thermometer, I can't say. I can't say that it is the practice of Santa Fe where a thermometer is put in the car and found to be 54 degrees, to check the thermom-

(Testimony of C. A. Mulvihill.)

eter with a thermometer that the Santa Fe owns to find out whether the thermometer is accurate or not.

Q. Now supposing that the car has been properly iced and kept at low temperature of 20 to 25 degrees, with the packages near the door when the door was opened, of a frozen commodity, be so soft as to be able to put your finger right through the outside [57] container and the inside container as well, into the product?

The Witness: No, not if they had been completely frozen. I would say that if a product was put into a car at 15 degrees below zero the product was properly frozen when it was loaded originally. If we assume that the car was pre-iced and it was iced at regular loading stations up to San Bernardino, I would say it would maintain a freezing condition. From the record of the icing which has been introduced in evidence and which the Santa Fe did in this case, I would say that normally, it should have maintained the cold condition of the car and the frozen condition of the product from the time it left Chicago up until the time it arrived in San Bernardino, but it wouldn't necessarily retain the identical temperature of a commodity when loaded. It would not retain the identical temperature when, that it was loaded at 15 degrees below zero, but it should maintain a freezing temperature which should range below 32 degrees.

Q. If the car was loaded and the product was

(Testimony of C. A. Mulvihill.)

15 degrees below zero and it was put into a car that was pre-cooled, and it was iced by Santa Fe and St. Paul up until it reached San Bernardino, at regular icing stations with the normal procedure, run of the mill icing. That product reached Los Angeles and the cartons visible appeared to be soft and moist—defrosted and you could put your finger into it. Now, I ask you under those conditions would you say the temperature of that car was proper?

The Witness: The condition of the packages wouldn't warrant that temperature if the temperature had been maintained up to the point of inspection. From those facts, I would not say that the defect or default would be from the time of last icing in San Bernardino on the 8th until the car was unloaded on the 11th. It would indicate that there was normal consumption of refrigerant up to San Bernardino. I testified before that that is the normal means of holding the temperature of that car, and that was maintained up [58] until San Bernardino. I couldn't say that if it was maintained in that way until at least it reached San Bernardino that the product should have been in good shape in San Bernardino without my making a definite inspection of the commodity. When a car arrives in San Bernardino and we look at the bunkers and the bunkers are full of ice, we do not break the seal to make an inspection of the product. I did not say that when you opened the door there

(Testimony of C. A. Mulvihill.)

is a blast of cold air or that on a warm day there is a fog in the manner in which you state. There is a rolling discharging action. You can feel the cold air in the car.

Q. Now, if a person opens that car and when he opened the car he didn't see any frost come out and he didn't see any vapor come out and the car appeared warm to him, would you say that the temperature of that car was in the same condition it should have been in?

Mr. Welsh: That is pure speculation and argument, your Honor.

Mr. Allen: This is a witness who for 22 years has been with the refrigerator department and in charge of this very operation.

The Court: Objection overruled.

The Witness: Those evidences wouldn't be definite or final. The thermometer is the final device to record the temperatures. It might be indicative, but your humidity on the date in question and your temperatures would determine the visible evidence. Generally speaking, however, when you open the door of a car you do see the vapor and you do see the frost and you do feel the cold air, if you are close enough to it.

Q. Now, what happens when the Santa Fe notifies a consignee that merchandise is arriving and the consignee does not immediately pick up that merchandise? The Santa Fe doesn't re-ice it, does it?

The Witness: If the bunkers warrant it, they

(Testimony of C. A. Mulvihill.)

are replenished. They inspect the bunkers from the time it leaves San Bernardino up [59] until the time it is unloaded. The bunkers are inspected at destination. The record indicates that the bunkers were 85 per cent full at 8:00 a.m. on the 10th, at the Bay Street Team Track. I don't know of my own knowledge on which track this car was located and I don't know whether this car was available for unloading at that time. My records do not indicate any inspection made after that and I don't know of my own knowledge. My records do not indicate any further inspection.

Q. What happens if it arrives at Bay Street, let us assume, and the consignee does nothing about it? Does the Santa Fe just leave it there to rot?

The Witness: If the bunkers are full on arrival and the consignee doesn't take delivery until they are either full or three-quarters full, he can authorize us to have them replenished and we will replenish them at his request. A consignee is allowed two days time before demurrage sets in. That is true on refrigerator cars as well as on other cars. I believe Santa Fe does make an inspection to determine whether or not the car is unloaded but it is not within our department to make the inspection.

Q. Now, what I want to know is just this one question, Mr. Mulvihill, and then I am through. What happens if a consignee has been notified, the consignee does not immediately rush there to pick

(Testimony of C. A. Mulvihill.)

up the merchandise but the car stands there up until the time demurrage sets in?

The Witness: Well, do you mean what happens?

Q. Who ices the car?

The Witness: If the car is three-fourths full when it is placed there after inspection and if additional icing is necessary it has to be on the authorization of the consignee.

Q. In other words, Santa Fe doesn't care?

The Witness: Well, it is in the tariff. That is our tariff regulation. [60]

Q. It just puts the car on the spur track or the Bay Street track and lets it stand there?

Mr. Welsh: Your Honor, this is all out of the point. The tariff is on file with the Interstate Commerce Commission which regulates the carriers and as Mr. Mulvilhill has stated, after the car is delivered it is up to the consignee if he wants ice put in it.

The Witness: I don't know whether a car is deemed delivered when it is put on the track or when it is signed for. That is a legal question which I am unable to answer. I can't answer as to whether it is still under the control of Santa Fe, nor can I answer whether we would permit the seals to be broken until the car is signed for. That is out of my department. I can't answer whether we would permit the seals to be broken until the car is signed for. Santa Fe does make an inspection of the car to determine whether it has been iced while it has been standing at the Bay Street Perishable Team

(Testimony of C. A. Mulvihill.)

Track. I can't say whether an inspection was made in this case. According to the record no such inspection was made. My records do not indicate any such inspection.

Redirect Examination

By the words, "those records" I mean the records which I have in my hand. I don't mean all the records of the railroad company under my control, just merely those in my department, my departmental records.

Recross Examination

By Mr. Allen:

My records do not indicate the condition of the car, nor does it show what happened from the time it left Chicago or Kansas City until it was unloaded in Los Angeles. They indicate a temperature record here at Los Angeles, the amount of ice in the bunkers on arrival, the commodity, and the position of the vents and plugs. It shows the location of the car and the full waybill reference. When I say location of the car, it refers to whether it is at the Bay Street terminal team track or some other place. It does not show on which track it was on. It does not show the specific track. [61]

Mr. Welsh: Plaintiff's Exhibit B for identification is a true and correct copy of a notice sent to Gouley-Burcham Company at 1848 East Vernon Avenue in Los Angeles, notifying Gouley-Burcham Company that Car ERDX 2667 was at the Bay Street Team Track and said notice is dated April

(Testimony of C. A. Mulvihill.)

9, 1948, at 11:00 a.m. with the initials J. S. Do you so stipulate?

Mr. Allen: I will stipulate that if you would call the witness the witness would testify that he made out that notice and that he mailed that notice to the Gouley-Burcham Company.

(Defendant's Exhibit B was then received in evidence.)

Mr. Allen: I am not stipulating, your Honor, that the notice was received. It only goes to the effect that if the witness were called here to testify that he would testify that he mailed it.

The Court: That he mailed this notice. Call your next witness.

TESTIMONY OF ED A. HOMAN

a witness called on behalf of Defendant.

Direct Examination

By Mr. Welsh:

My name is Ed A. Homan. I am the Team Track Clerk at Bay Street in Los Angeles. I was at the Team Track in the month of April, 1946. I have been at the Bay Street a little over 11 years. I have been with Santa Fe since 1926, July 20th. I do have records indicating a car No. ERDX 2667 which arrived at Bay Street on April 10, 1946. The car was on Tract 5. I can show the relative position of that track. At Bay Street we have tracks one, two, three, four and five. I can point to the spot on the track that the car was located. I don't remember

(Testimony of Ed A. Homan.)

how far it was from the west end of the track. The track runs east and west, you see, there at Bay Street, and I have got the location of the track—how deep it was in. It was the sixth car from the east end, about middleways of the track. The car in the [62] position of the sixth car from the east end on Tract 5 is available for unloading. It was available for unloading when it was in that spot. Car ERDX 2667 was spotted at the team track, the sixth car from the east end on Track 5 at 7:00 o'clock on April 10th, 1946. I notified Mrs. Belyea that the car was there. I notified Mrs. Belyea at 8:15 a.m. on the 10th. I spotted the car at 7:00 a.m. I did not call Gouley-Burcham. I called Belyea because they told me a couple of days before in regards to the car and that they were looking for the car, so I called them. Mr. Belyea came down to the track. On the 10th, I would judge, between 8:00 and 8:30, right after I telephoned. He came by the office and we went down to the car. I went to the car with him. That was the first time it was opened. I was the only one with Mr. Belyea when we walked down to the car. Just him and I, just the two of us, we were alone. When we got down to the car the seals were intact. The seal on the north side of the car was 4564 FMC and also on the north side was P-87922 M & St. L. On the south side the seal was number 45631 FMC. Those seals were intact when I went down into the car. Mr. Belyea broke the seals and took them off the door. I was standing there when he did it. Mr. Belyea opened the door. I was not standing right next to him, but I was close by. I

(Testimony of Ed A. Homan.)

was close enough to see into the car. I saw the lading in the car when I looked at it. I saw three or four soft cases in the doorway. I don't know what they call it—kind of wet—moist-like. Three or four were wet and moist. They wasn't mush or nothing like that. I don't know what they call it. They have some kind of name for it. I didn't see any others that were wet or moist. Mr. Belyea did not say anything to me about the condition of the car or the lading. He made no complaint whatsoever. He did not complain to me about the mechanical condition of the car. He did not complain to me about the lading inside of the car. He didn't say anything particular to me, that is, when he first opened the door. Then he closed it up and then he went [63] back and I think he brought the man from Pic'N'Time down with him, and then there was no complaint made to me whatsoever as to the condition or the load or nothing. They did not ask for an inspection. They did not ask for a carrier's agent to inspect or anyone else. My name appears on Defendant's Exhibit A which has been admitted as an exhibit and introduced in evidence. I gave that receipt to Mr. Belyea to sign and he signed it, on the 11th. That was the day after he came down to look at the car. The words "no exceptions reported" were not on the paper when Mr. Belyea signed it. Otherwise it is in the same condition as when he signed it. I wrote the words "no exceptions reported." I wrote it merely as a matter for my own reference. That is all. Car ERDX 2667 was

(Testimony of Ed A. Homan.)

completely unloaded about 6:00 p.m. on the 11th. It is on my delivery order record. The car definitely was unloaded on the day after it was inspected by Mr. Belyea. I looked at the bunkers on Car ERDX 2667 on April 11, 1946. I have a record made in the regular course of business indicating what the capacity was at the time. It was 75 per cent full of ice. That was the day on which the car was unloaded. I did not inspect the thermometer Mr. Belyea used to take the temperature of the car. I testified that the car was in the 6th position on Tract 5 on the 10th. The car was not moved before it was completely unloaded. It remained on Tract 5 and was unloaded on Tract 5.

Cross Examination

By Mr. Allen:

The first time that I spoke with Mr. Belyea concerning this car was between 8:00 and 8:30 on the 10th. Mr. Belyea called me on the telephone before the 10th. He was looking for the car. He called me several days before the car arrived. I would say he called me a couple of days before the car arrived, not five days before the car arrived. The first time he called me I told him that I had no [64] record of the car. I told him the car had not yet arrived. Mr. Belyea called me just once. He called me only one time. He asked me if the car was in town, if it had arrived and I told him no. I don't know of his saying anything about the car arriving somewhere in the city and not having been spotted yet; I have no record of it.

(Testimony of Ed A. Homan.)

Q. Let me put it to you this way: If Mr. Belyea testified that you told him that the car had arrived in Los Angeles but had not been spotted as yet, as they were having some question as to the switching of it, would you say he was in error?

Mr. Welsh: Your Honor, this is argumentative. The witness answered his direct question. He said he had no recollection of it.

The Court: He may answer.

The Witness: I have no recollection of him calling me or me telling him that at all and my record doesn't indicate that I told him that. I don't recall it. I handle on an average of 35 cars a day. When a car comes in I personally go to each and every car to see that the seal is broken on each and every car that arrives. We take seal records. The records on the seals are taken before the seals are broken. They are taken when the car is spotted on the track. The seal records are not necessarily taken in the presence of the consignee. We take seal records when the consignee is not there.

Q. Now, do you permit a seal on a car to be broken before the consignee signs for the car?

The Witness: Sometimes the car—they start to work on the car before we get the receipt, the deliver order. Sometimes they come down there to work the car before we get the delivery order.

Q. Well, you don't deliver the car until they sign the receipt first, do you?

The Witness: Oh, sure.

Q. In other words, you deliver the merchandise

(Testimony of Ed A. Homan.)

in the car and then you let them come back two or three days later or a week [65] later and sign the receipt.

The Witness: Oh, no, oh, no.

Mr. Welsh: That is not the witness' testimony, your Honor. He said they let them open the car before they signed a receipt. He is putting a conclusion in the mouth of the witness.

The Court: Yes.

The Witness: It is my practice to permit them to open a car before they sign for it. That is the usual custom and practice. After they open it they sign for the car, they get a delivery order and they come in and sign for it. In this case, I remember going with Mr. Belyea to open the car. I went down with him. I am sure it hadn't been opened prior to that time. I didn't ask Mr. Belyea to sign for the delivery ticket when he opened the car because I didn't have the delivery order. The delivery order hadn't come down from Third Street from where they make them out. I knew that Mr. Belyea had a right to open the car because he had the car number. I just took his word for it. In other words, if you would come up there and say you had a car standing over there and you had the numbers for it and had called previously I would let you open it without signing for it if you had inquired for the car previous to that. I examined the bunkers by opening them up. I climbed up on top. I did not have a flashlight with me. I just looked down into it. There was no light in the bunker—there was ice

(Testimony of Ed A. Homan.)

down there and I just looked down in there. I just glanced down and estimated as to what the car had. There are no markers in there to indicate how much ice is in the bunker. When I say I estimated it at 75% that was my best guess. After Mr. Belyea and I went down to that car and broke the seal, Mr. Belyea looked at the car. He didn't say anything to me about it. He wanted to know, he asked if I had a thermometer. We don't have thermometers down there and told him so.

Q. Is it the ordinary thing for a consignee of a car when he opens a car to say to you, "Let me have a thermometer?" [66]

The Witness: Well, he wanted—he wanted to take the temperature and we didn't have a thermometer.

Q. That isn't what I am asking you. I am asking you if it is the ordinary and customary thing when a consignee opens a car to ask you for a thermometer?

The Witness: Well, some do and some don't.

Q. When do they ask for a thermometer?

A. He asked me when he opened the car.

Q. When does a consignee ask for a thermometer? It is only when there is a question as to the temperature of a car, isn't that so?

Mr. Welsh: The question as now, put, I believe, is argumentative, your Honor.

The Court: What was done in this instance is the question here.

Mr. Allen: Excepting this, your Honor. This

(Testimony of Ed A. Homan.)

witness testified that here is a man who comes to him and asks for a thermometer. We have a right to show by this witness that this asking for a thermometer was unusual, extraordinary and different and the reason why the thermometer was asked for was because there was something wrong with the temperature of that car, and in the ordinary situation where the car appears to be in good order the consignee never asks for a thermometer.

Q. How often does a consignee ask for a thermometer?

The Witness: Not very often.

Q. Very seldom, isn't that so? A consignee does not ask for a thermometer very often. A consignee very seldom asks for a thermometer. The only time that a consignee asks for a thermometer is when there is a question as to the temperature of the car. In this case there was a question about the temperature of the car so he asked for a thermometer. I did not see him put the thermometer in there. He closed the car up and he went and got the thermometer and then he brought the thermometer back. I was not there when he brought [67] it back. I saw three or four cases in the doorway that were kind of wet. By kind of wet I mean they showed dampness. It showed defrosting or whatever they call it. I have been in the business some 22 years, defrosting is what they call it. That is what they call it and it showed evidence of defrosting. I did not see him push his finger into it? To my notion it was not that soft. I didn't see him do it. I did not check

(Testimony of Ed A. Homan.)

to see how many cases were soft, only what I saw in the doorway. I did not get into the car to see whether any other merchandise was soft. All I saw were a few cases that were around the outside. I wouldn't know whether it was three cases or 25 cases, only what I saw of it. I told you I saw just what I saw, all I saw was the cases in front. None of them were removed to see whether any of the cases in the back were soft. He closed the car up. I did not try to determine whether the thermometer used by Mr. Belyea or which he was going to get was accurate. I didn't have a thermometer. When the car was opened and the doors were opened there was no evidence of a fog coming from the car.

Q. Now when you open a car which is thoroughly cool, on a warm day like this was, it is usual for fog to come out of that car, isn't it?

A. Didn't none come out of that one.

Q. But I mean it is usual, is it not?

A. I haven't saw any of it come out of any cars down there. I have had iced cars there before.

A. When a car is thoroughly cool the appearance is that cool air comes out when you open the door. When I opened the door on this car cold air came out. It was as cold as it usually seems when you open the door. It is customary that cars that come in usually have some evidence of defrosting around the doors. [68]

Q. What percentage of the cars that you have

(Testimony of Ed A. Homan.)

watched opened up have evidence of defrosting around the doors on the package that are wet?

A. I said three or four of them that I saw.

Q. Mr. Homan, if you would just listen to the question, that isn't what I am asking you. What I am asking you at this time is how many cars that you opened up the doors, that are properly cooled, do you find evidence of defrosting on the packages and find the packages wet? A. Very few.

Q. So that when a car comes in and there is evidence of defrosting then there is a question about what is happening, isn't there? A. Why, yes.

Redirect Examination

By Mr. Welsh:

I have been looking into bunkers of refrigerator cars for a long time. I will say 20 years. When you look into a bunker you stand up on the top of the car and open up the vents and plug. The light from the outside enters the aperture to some extent. By looking at a car I judge whether it is 75 or 85 or 90 percent full of ice by the distance that the ice is from the top. I have been doing that for about 20 years.

Recross Examination

By Mr. Allen:

I recall the incident concerning this car and Mr. Belyea from my notes because my notes so indicate.

TESTIMONY OF ANTHONY DOMINIS
called as witness on behalf of the Defendant.

Direct Examination

By Mr Welsh:

I am associated with a firm that is in the business of distributing frozen foods. At the present time the firm name is Market Wholesalers—Market Distributors, Incorporated. In April of 1946, the name of the firm was different. It was Pic’N’Time Frozen Foods Company. I was general manager of the firm at that time. Our invoice records show that we received a shipment of frozen shrimp creole from Hamilton Foods in Chicago via Santa Fe Railroad in car ERDX 2667. I don’t have any personal records that would indicate it but we did receive 450 cases of shrimp creole at that time. From Hamilton Foods in Car ERDX 2667. I do recall having gone down to the Santa Fe Bay Street team track with Mr. Jack Belyea to look at the lading in that car. That was on or about April 10, 1946. It was the day that the car was actually unloaded and my merchandise, my portion of the car was delivered to me. I believe that was on the 11th but I wouldn’t swear to it. Mr. Belyea called me and asked me if I would come over and look in this car as he felt that there was some signs of defrosting there. Of course I immediately went down to the Bay Street team track and looked at the merchandise with Mr. Belyea. I got up into it—not into the car, but on the railing of the car there and looked at a few cases of merchandise. Those immediately in the

(Testimony of Anthony Dominis.)

door—there were a few, possibly half a dozen or 10 cases that I looked at that were pretty well defrosted, but beyond that we felt that the merchandise was in sufficiently frozen condition that we could use it and I asked Jack to unload the merchandise and bring it to our warehouse. I don't believe that I got on top of the lading. I would say I stood up so that I could see over the top of the car. I saw about 10 cases that were a little defrosted right immediately in the door—not in back in the car. [70] Those that we examined closely in the door—some of them were really quite badly defrosted. I would say about half a dozen cases—that is a round figure. I told Jack that I didn't want those particular ones but the balance of the load, to get it off the car and bring it over to our warehouse. I did not have Mr. Belyea pick or chose which cartons should be taken to our warehouse, with the exception of telling him not to give me those six or ten. Aside from the few cases right in the immediate doorway the first to come out of the car were the first into the truck and taken over to our place. In other words we gave no instructions as to which cases he should load on the truck for us except not to load those particular six or ten. Some of those cases were hard. Very hard. As hard as they could be.

Cross Examination

By Mr. Allen:

I did not remain at the car until the car was unloaded. I don't know how long I was there after I

(Testimony of Anthony Dominis.)

told Mr. Belyea that I would take some of the merchandise in the car. I think I was there with all of the inspection and everything, over an hour, and then I left. The merchandise was delivered to me by Mr. Belyea. I didn't watch which merchandise Mr. Belyea took. I told Mr. Belyea I didn't want any bad merchandise. I left it to Mr. Belyea to pick the merchandise that he wanted to give me—I mean as to good merchandise. I told him definitely I didn't want those few cases that we looked at there in the door, but the rest of it—how he unloaded it I couldn't say. I wouldn't know whether he hand-picked my merchandise or didn't handpick it. At least the cartons which we received were in hard condition. We found only a few cartons that were soft. I recall writing a letter to the Hamilton Foods dated May 2, 1946, which letter was written by Pic'N'Time Frozen Foods and which bears my signature. That letter stated that there were 25 cases which were [71] soft. I see from the letter that my recollection is bad. My recollection would have been better in May of 1946 which was two or three weeks after this situation took place than it is now. I want to change my testimony and say that there were 25 or 30 cases which were bad. I had no complaints from anyone in the trade concerning this merchandise. We put it in storage immediately. The situation as far as storage space at the time was concerned was very critical. It was difficult to get storage space. It would be difficult for me to say how soon after we received the merchandise it was

(Testimony of Anthony Dominis.)

moved or consumed in the regular channels, but offhand I would say that in a period of 45 to 60 days possibly, or maybe longer than that—I don't recall how long.

Q. Was the item scarce at the time?

A. Well, it was the only shrimp creole that we carried or had any access to. I don't recall whether there were any others in the frozen form in the market at the time. It was a new commodity, more or less, in the market. At that time it was readily marketable, and there was a demand for the product.

Redirect Examination

By Mr. Welsh:

The shrimp which we got were in good condition. We had no claims. There was no damaged shrimp in the 450 cases that we received.

TESTIMONY OF JAMES GOODRICH

a witness on behalf of the Defendant.

Direct Examination

By Mr. Welsh:

My name is James Goodrich.

I am now working as a traveling freight claim adjuster for the Santa Fe Railway. I have been with Santa Fe since 1942 and have been working with railroads since 1924. I would say that I have spent [72] roughly about 12 to 15 years in the inspection of perishable commodities in refrigerator cars. I would say that I have inspected thousands

(Testimony of James Goodrich.)

of cars, damaged and undamaged. That inspection would be made pursuant to determining whether or not settlement should be made with the shipper and whether or not there was damage. I have found cars in which there were defrosted cartons or packages near the doorway. I have found cars where there were packages near the doorway which were defrosted, but the other packages were not defrosted. I found that condition many times. I have inspected cars where the packages other than those immediately in the doorway were in excellent condition. I have very much so noticed that to be true with very perishable commodities. As an example, I found a car with a highly perishable commodity, viscerated poultry, which had been defrosted near the doorway, but the rest of the lading was in good order. Viscerated poultry, I mean poultry that is cut up and put in package and shipped in a frozen condition to be sold to retail stores. It is a highly perishable commodity. In connection with that shipment, I opened the doors where the cartons right in the doorway would be completely defrosted and the contents thoroughly spoiled and decomposing, where the balance of the car would be frozen solid, and in edible condition.

Q. And no claims for the balance of the car?

Mr. Allen: Just a second. I object to that because that is going far afield from what we have here—what happened in other cases.

The Court: Objection sustained.

The Witness: I use a thermometer in my work.

(Testimony of James Goodrich.)

Very often I inspect the thermometer and have it tested. With proper care a thermometer should be inspected at least twice a month for accuracy. [73]

Voir Dire Examination

By Mr. Allen:

I have used thermometers on and off in my work for 15 years. I have used alcohol and mercury thermometers. There is a difference between the two. They register Fahrenheit. I keep a thermometer with me when I make inspections. I use a type that is recommended by the engineering department of our refrigerator department—our engineers. Ordinarily I check it twice a month—possibly oftener than that simply by shaking it down. Ordinarily with this type of thermometer you will have very little trouble. It is a type that comes in a metal case. You can break it down to see whether there is any breaking in the vacuum of your mercury or alcohol. In this particular type of thermometer you find very little variance something happens to the thermometer and it goes bad and then, of course, it is valueless. Generally speaking a thermometer will vary only one or two degrees. I would have to see a thermometer for my own opinion on it. I could not say whether generally speaking whether a thermometer used by a company all the time is in pretty good condition excepting as to a possible exception of one or two degrees. I know how to test a thermometer to see whether it is good or not. I test it by shaking it down. That is the only way you test a

(Testimony of James Goodrich.)

thermometer. I am talking about visual examination. That is the only examination I make. If a thermometer goes up or down I would know with my naked eye whether it was recording properly. If I would see a break in my mercury or see the vacuum broken down I would know it wouldn't record perfectly. I would say that any time your vacuum is broken, you will definitely not get an accurate reading. If your vacuum isn't broken and the mercury or alcohol is still solid, you will get an accurate reading all the time. There may be a degree or so of variation. [74]

Redirect Examination

(Resumed)

By Mr. Welsh:

Q. Tell us why it is that a thermometer has to be checked periodically.

Mr. Allen: This witness has not qualified himself as an expert.

The Court: Only from what experience he has had with one. He has had some experience. Objection overruled.

The Witness: A thermometer has to be checked periodically because if the vacuum is broken in your thermometer or if the mercury or alcohol is broken down, you can't get an accurate recording. In other words, the thermometer may record but it may record at any figure—you can never be sure as to how accurate it would be. I have opened a lot of refrigerator cars where the lading was per-

(Testimony of James Goodrich.)

fect, no damage at all. There has been no mist frequently coming out of that car in the month of April. You will always feel the rush of air but so far as a cloud of steam or condensation of moisture I would say no, it isn't the rule.

Cross-Examination

By Mr. Allen:

If a thermometer is placed in a car and the thermometer registers 54 degrees, and then the thermometer is taken out of the car and it is placed underneath a package and it registers 50 degrees I would say that it is recording. The only question would be whether or not off. It could be off one degree or it could be off 20 or 30 degrees. I mean to say that a thermometer will register a difference of 4 degrees and can still be off as much as 20 or 30 degrees. When you open the door of a car thoroughly frozen you feel a rush of cold air.

Q. Now, Mr. Mulvihill testified this morning that when a car is thoroughly frozen and the temperature is such as it was on this day, close to the eighties, or up in the eighties, you usually [75] see a mist come out of the car. When does that situation arise?

A. Well, I would say it arises from a condensation of moisture in there when you get a fog coming out of a car, but I have also opened many cars where you had no—you could see nothing but you could always feel the cold air.

Q. Now if the temperature in a car registers

(Testimony of James Goodrich.)

45 degrees how long would it ordinarily take for the temperature of that car to go up from a point, let us say of 20 or 25 degrees to, let us say, 54 degrees.

A. Well, it loses—a refrigerator car loses its temperature pretty rapidly when the doors are opened. In other words, it **equalizes with the outside** temperature pretty rapidly, because that is a big opening when both doors are open and while the commodity temperature wouldn't be effected by the same ratio your car temperatures would. They would rise very quickly.

Q. Well, now supposing we have as in this situation, where the door was opened and the doors were immediately shut and they went to get a thermometer, opened the door just to put the thermometer in, closed the door and then let it stay there for 15 minutes and then took a reading after that, how long under those circumstances would you say it would take a car to reach a temperature of 54 degrees?

A. Well, I wouldn't want to say in the exact number of minutes. I would say that ordinarily it would take a matter of anything from 20 to 40 minutes.

The Witness: That is my estimate. With the doors open—having been opened for **five minutes** time and then shut again, that in 30 or 40 minutes the temperature of that car would go from 20 to 54 degrees. [76]

(Testimony of James Goodrich.)

Q. You mean to tell me the doors having been opened for five minutes time and then shut again that in 30 or 40 minutes the temperature of that car would go from 20 to 54 degrees?

Mr. Welsh: That is what the witness stated, your Honor. I don't see the point in this question: "Do you mean to tell me."

Q. (By Mr. Allen): Is that what your testimony is? A. I say that it is possible.

Q. Now, what is the usual condition? How long does it usually take?

Mr. Welsh: Your Honor, that question has been asked and answered. [76A]

Mr. Allen: This man is an expert on refrigerator cars and has been for 20 years.

The Court: I will let him answer it once more. I think he has answered it but you may go ahead.

The Witness: It would depend on a lot of conditions. I have seen cars that were pulled into a storage dock where the doors are opened for three hours while they are taking out a half of a load and still we have recorded temperatures a loss of only possibly 25 to 30 degrees and then again I have seen cars where under almost identical circumstances, they will lose as much as 40 degrees in that much time. I am talking about a door that has been opened for three or four hours. Where the door has been open for five minutes it wouldn't lose that much. It shouldn't lose that much temperature.

(Testimony of James Goodrich.)

Q. That is what I am talking about. In other words, if the temperature was 54 degrees then it must have reached that temperature over some period of time, isn't that so?

A. Yes, if it was 54 degrees when it was opened --if that is an accurate recording it would take time to lose it.

REBUTTAL OF THE PLAINTIFF
TESTIMONY OF JACK BELYEA

Direct Testimony

By Albert H. Allen:

I talked to Mr. Holman on the telephone two or possibly three times prior to the morning the car arrived. Mr. Holman told me that he had no information on the car. They hadn't received any report, but he would notify me on arrival when it was available for unloading.

Q. Now did he tell you that there was some trouble with spotting the car? (No answer.) Something in connection with the switching of it?

A. If I recall, that it was in town, but they weren't able to get it spotted. There was something to that effect. I am positive that I removed the merchandise from that car on the same day that I broke the seal and first opened it. I am positive that I signed the receipt of that car prior to breaking the seal. I am [77] almost certain. At

the time when the door was opened there was no rush of cold air from that car.

Thereupon the plaintiff rested his case and the defendant rested his case and counsel proceeded with the argument.

[Endorsed]: Filed June 14, 1948. Edmund L. Smith, Clerk. [78]

[Endorsed]: No. 11961. United States Circuit Court of Appeals for the Ninth Circuit. Hamilton Foods, Inc., a corporation, Appellant, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Jack Belyea, doing business as Refrigerated Express Company, Appellees, and The Atchison, Topeka and Santa Fe Railway Company, a corporation, Appellant, vs. Hamilton Foods, Inc., a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed June 25, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11961

HAMILTON FOODS, INC.,

Appellant and Cross-Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas corpora-
tion,

Appellee and Cross-Appellant.

STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

The following are the points upon which appel-
lant relies on its appeal from the judgment of
March 29, 1948:

1. That the Conclusions of Law and Judgment
are not supported by the Findings of Fact and are
in conflict therewith.

2. That the appellee breached its contract of
carriage and the negligence of the appellee in trans-
porting the merchandise shipped by the appellant
was the proximate cause of the damage suffered by
appellant.

3. That the appellee was negligent in permitting
a perishable commodity to remain in a freight car
over which it had full control and jurisdiction
without icing for sixty-four (64) hours and twenty-
five (25) minutes and this neglect and breach of

the contract of carriage was the proximate cause of the damage which appellant suffered.

4. The amount allowed to the appellant for damages is inadequate, unreasonable, arbitrary and is contrary to the Findings of Fact and the weight of the evidence.

5. That is was the duty of the court from the facts as found by the court to enter a judgment for the full damages sustained by appellant which damages were in the sum of Forty-four Hundred Fifty-five Dollars (\$4455.00), together with the loss of freight in the sum of Two Hundred Ninety-four and 75/100 Dollars (\$294.75).

Dated this 26th day of June, 1948.

ALBERT H. ALLEN and

HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,

Attorneys for Appellant and

Cross-Appellee.

[Endorsed]: Filed June 29, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

The following are the points upon which cross-appellant relies on its cross-appeal from the judgment of March 29, 1948:

1. That the Conclusions of Law and Judgment are not supported by the Findings of Fact and are in conflict therewith.

2. That the trial court erred in admitting the evidence which should have been excluded.

3. That appellant failed to make out a prima facie case against this cross-appellant and that the trial court erred in having failed to dismiss the action.

4. That if appellant made out a prima facie case against this cross-appellant then the evidence of the cross-appellant introduced at the trial disclosed that it was not negligent and the burden of going forward with the evidence then shifted to the appellant to prove affirmatively that this cross-appellant was negligent. Appellant failed to prove any affirmative act of negligence against this cross-appellant and the court erred in not entering judgment for this cross-appellant and against appellant.

5. That the Findings of Fact are contrary to the manifest weight of the evidence and contrary to law.

Dated this 30th day of June, 1948.

ROBERT W. WALKER,

J. H. CUMMINS,

LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,

Attorneys for Appellee and
Cross-Appellant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 2, 1948. Paul P. O'Brein,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED PURSUANT TO RULE 19(6)

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

The following are the parts of the record which
appellant designates to be printed pursuant to
Rule 19(6):

1. Print from the designation of contents of
record the entire record as certified by the Clerk
of the District Court for the Southern District of
California, Central Division, excepting the follow-
ing items in said designation of contents of record
which you are requested to omit and not to print:

(A) Designation No. 6, being the deposition of
Alvin H. Mazer taken January 6, 1948, being
Plaintiff's Exhibit 3, filed March 9, 1948.

(B) Designation No. 7, being the deposition of
Alvin H. Mazer taken March 3, 1948, Plaintiff's
Exhibit 3A, filed March 9, 1948.

(C) Designation No. 8, being deposition of Hale
C. Burrus taken January 6, 1948, Plaintiff's Ex-
hibit 4, filed March 9, 1948.

(D) Designation No. 9, being deposition of Hale
C. Burrus taken March 3, 1948, Plaintiff's Exhibit
4A, filed March 9, 1948.

(E) Designation No. 14, being Plaintiff's Points
and Authorities, filed March 15, 1948.

(F) Designation No. 15, being Defendant's Motion for Judgment, filed March 10, 1948.

(G) Designation No. 16, being Reporter's Transcript of Evidence, Vols. 1 and 2.

(H) Designation No. 21, being Statement of Points on Appeal.

2. Print the agreed Narrative Statement of Fact stipulated to by appellant and appellee.

3. Print the Statement of Points on Appeal filed herewith.

Dated this 26th day of June, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,
Attorneys for Appellants and
Cross-Appellees.

[Endorsed]: Filed June 29, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED PURSUANT TO RULE 19(6)

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

This cross-appellant adopts as its own the designation of parts of record to be printed filed hereto-

fore by appellant and requests that the entire record as certified by the Clerk of the District Court be printed except those portions excluded in appellant's designation.

Dated this 30th day of June, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Appellee and
Cross-Appellant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 2, 1948. Paul P. O'Brien,
Clerk.



No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE AND DOE FOUR,

Appellees.

APPELLANT'S OPENING BRIEF.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

9441 Wilshire Boulevard, Beverly Hills,

Attorneys for Appellant.

FILED

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FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE AND DOE FOUR,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

Appellant shipped a car of frozen shrimp creole from Chicago, Illinois to Los Angeles, California. The merchandise was consigned to the appellant in care of its agent in Los Angeles. Part of the merchandise was destined for Los Angeles and part of it to be re-shipped to Bakersfield and San Francisco.

At the time the shrimp was delivered to the carrier, it was frozen to a temperature of 15 degrees below zero.

It was loaded into a pre-cooled refrigerated car supplied by the carrier. The instructions to the carrier were

“insure icing to capacity, 13,000 lbs. crushed ice and 3900 lbs. Salt. Re-ice to capacity crushed ice 30 per-cent salt at all regular icing stations and oftener, if delayed.”

The car was then iced to capacity with 13,000 lbs. of crushed ice and 3900 lbs. of salt. As an added precaution, 1000 lbs. of dry ice was placed within the car and on top of the shrimp.

The car left Chicago on April 2nd, 1946 at 11:30 A. M. in good and frozen condition. The car was iced as follows:

On April 2 at 5:00 P. M. the car was re-iced at Savannah, Illinois. It required 3000 lbs. of ice.

On April 4 at 1:40 A. M. the car was re-iced at Kansas City. It required 1000 lbs. of ice.

On April 4 at 2:05 P. M. the car was re-iced again at Kansas City. It required 1000 lbs. of ice.

On April 5, at 6:53 A. M. the car was re-iced at Waynoka. It required 1000 lbs. of ice.

On April 5, at 9:10 P. M. the car was re-iced at Clovis. It required 600 lbs. of ice.

On April 6, at 11:35 A. M. the car was re-iced at Belen. It required 600 lbs. of ice.

On April 7, at 8:45 A. M. the car was re-iced at Winslow. It required 900 lbs. of ice.

On April 7, at 10:20 P. M. the car was re-iced at Needles. It required 900 lbs. of ice.

On April 8, at 7:05 P. M. the car was re-iced at San Bernardino. It required 1500 lbs of ice.

The elapsed time of re-icing after the car was first iced at Chicago is as follows:

First station:	26 hours, 45 minutes.
Second station:	32 hours, 40 minutes.
Third station:	12 hours, 25 minutes.
Fourth station:	16 hours, 48 minutes.
Fifth station:	13 hours, 17 minutes.
Sixth station:	14 hours, 25 minutes.
Seventh station:	21 hours, 10 minutes.
Eighth station:	12 hours, 35 minutes.
Ninth station:	20 hours, 45 minutes.

On April 11, at 11:30 A. M., the car was made available to appellant at the Bay Street Perishable Team Track in Los Angeles for the purpose of unloading. During all of this time, the car was in the control and possession of the carrier. On April 10, the maximum temperature in Los Angeles was 85 degrees and on April 11, it reached 88 degrees. *For 64 hours and 25 minutes the car was not re-iced.*

The average icing time between icing stations, from the time the car left Chicago to the time it arrived in San Bernardino was 18 hours and 50 minutes. The average amount of ice which was added at each icing station was 1166 lbs. of ice.

Though Los Angeles is a regular icing station, no ice was added in Los Angeles. No ice was added to the car after it left San Bernardino.

Usually, when an iced car is opened there is a rush of cold air from the car, and on a warm day a vapor is emitted when the door is opened. When this car was opened there was no rush of cold air and there was no vapor. Though the temperature of the car should have

been 5 degrees or less, the temperature in the car had risen to 54 degrees, which was the temperature when the door was opened.

The shrimp should have arrived in a hard and frozen condition. When the trucker, Belyea, opened the car, he immediately observed that the cartons of shrimp nearest the door were defrosted and soft. It was so wet and soft that when he put his finger against the carton, his finger went through the outside carton, through the inner container and into the shrimp itself. Belyea immediately notified Santa Fe's agent and notified the Los Angeles consignee who was to receive 550 cartons of shrimp.

There was a shortage of frozen shrimp in Los Angeles and the local merchant who was to receive 550 cartons endeavored to salvage what he was to receive. The trucker Belyea then handpicked 550 of the hardest cartons and delivered them to the merchant in Los Angeles where they were immediately placed in a refrigerator. The merchant subsequently disposed of the shrimp in his course of trade. He made no chemical analysis of the shrimp he handled nor did he attempt to determine whether the quality had been affected. He made no attempt to determine whether it was good or bad.

The trucker, Belyea, then had on his hands the remaining 450 cartons which were destined for Bakersfield and San Francisco. He attempted to find refrigerated storage space in Los Angeles rather than move the shrimp to Bakersfield and San Francisco, but there was no storage space available. Though he called every refrigeration

concern in Los Angeles and made long distance calls as far as Pomona, he was unable to find any storage house that had any space.

The trucker, Belyea, was then faced with a dilemma of whether to leave the shrimp in the car to rot or attempt to move it to the merchants in Bakersfield and San Francisco. He elected the former course as to 35 cartons of shrimp which were so soft as to be visibly deteriorated and contaminated. He elected the latter course as to the remaining 415 cartons which he attempted to salvage.

Belyea's truck was a modern refrigerated truck, insulated on the floor with six inches of cork. The walls and ceiling of the truck were insulated with six inches of spun glass and other insulating material. The truck was equipped with blower fans and refrigeration equipment. The refrigerated truck was of modern design and was capable of holding any frozen food product at the temperature of the product when it is placed in the truck. If the temperature of the food when placed in the truck is above 25 degrees the refrigeration equipment in the truck will reduce the temperature at least ten degrees.

At the time Belyea loaded the shrimp in the truck, the truck already was laden with frozen broccoli and frozen cauliflower, which likewise was destined for Bakersfield and San Francisco. As soon as the shrimp was loaded the truck proceeded on its course.

The truck arrived in Bakersfield the following morning. The trucker delivered the shrimp, broccoli and cauliflower to the merchant. The broccoli and cauliflower were

visibly hard and were accepted by the merchant, but the shrimp creole was soft and was rejected. Though placed in the storage house of the merchant, the merchant refused to accept the shrimp.

The truck then proceeded to San Francisco. Here again, the broccoli, cauliflower and shrimp were delivered to their destination. Again the cauliflower and broccoli arrived in a good, hard and frozen condition and were accepted by the merchant. The shrimp creole was rejected as being soft and spoiled. Though the cartons were placed in storage, the shrimp was spoiled and it was stipulated that the 415 cartons of shrimp creole was totally unfit for human consumption and a total loss.

An expert chemist determined that when frozen food, such as shrimp, reaches a temperature of 20 degrees, it starts to deteriorate and loses its color, fragrance and quality. Refreezing will not restore its color, fragrance or quality. When frozen shrimp reaches a temperature of 20 degrees it commences to defrost and must be consumed immediately. The chemist determined that frozen food products must be kept at a temperature at least below 20 degrees.

The above facts are all concededly true. The Court granted damages for 40 cartons of shrimp, 35 of which were left in the freight car. The Court refused to grant damages for the 415 cartons of shrimp which were transferred to Bakersfield and San Francisco and which appellees stipulated were spoiled and not fit for human consumption.

I.

The Conclusions of Law and Judgment Are Not Supported by the Findings of Fact and Are in Conflict Therewith.

The Findings of Fact, when reduced to their simplest form, set forth:

A. The shrimp creole was in good and frozen condition prior to delivery to the carrier and was delivered to the carrier in a good and frozen condition with proper and adequate instructions. [Findings of Fact 4, 5, 6, 7 and 8—Tr. pp. 19-21.]

B. The shrimp creole arrived in a car which was warm, having a temperature of 54 degrees and that the visible cartons of shrimp near the door were wet, soft, defrosted and spoiled. [Findings of Fact 16—Tr. pp. 23-24.]

C. That upon arrival, 415 cartons were taken from the car and loaded in a refrigerated truck which also carried frozen cauliflower and broccoli; that the truck then went to Bakersfield and San Francisco and arrived there the following morning; that the cauliflower and broccoli were hard and frozen, but the shrimp was soft and spoiled and was a total loss to the plaintiff. That there was no intervening act affecting the shrimp from the time the shrimp arrived in Los Angeles and the time it was delivered in Bakersfield and San Francisco. [Findings of Fact 19, 20, 21—Tr. pp. 24-26.]

D. The defendant Belyea who opened the car and removed the shrimp and whose truck was used to reship the shrimp to Bakersfield and San Francisco was not guilty of negligence. [Findings of Fact 24—Tr. p. 26.]

From the foregoing Findings of Fact only one conclusion can be drawn, namely, that since the shrimp was in good condition and properly frozen when shipped, and it arrived in a damaged condition, and since there was no negligence on the part of Belyea or any intervening act which could be responsible for the damage, that the appellee was negligent and failed to perform its contract of carriage. As a result thereof, appellant suffered damages for all the cartons that were condemned.

Delivery of merchandise made to a carrier in good condition but is received by the consignee in a deteriorated condition, makes out a *prima facie* case and thereafter the burden of proof is on the defendant carrier that the damage, if any, was no fault of the carrier. The burden of proof is then on the carrier and he must prove that he was free from neglect and that the damage to the goods resulted either from an act of God, public enemy or the inherent nature of the goods themselves. *Crinella v. Northwestern Pacific Railroad Co.*, 85 Cal. App. 440, 259 Pac. 774; *Hall & Long v. Railroad Companies*, 80 U. S. 13 Wall. 367, 372, 20 L. Ed. 659; *Bonstein v. Baltimore & O. R. Co.*, 29 Fed. Supp. 837.

In the instant case the evidence was and the Court found that the merchandise was delivered to the appellee in good condition and received by the appellant in bad condition and from this finding there can be only one conclusion—that the appellee was negligent and appellant is entitled to damages for the total amount of the loss.

The Court found that there were between twenty-five and forty cases of shrimp creole which were visibly defrosted and spoiled. The evidence was and the Court found that these cases were permitted to remain in the freight car as being too rotten to move. [Findings of Fact 16—Tr. p.

23.] The evidence was and the Court found, however, that in addition to the cases which were *visibly* defrosted, there were 415 cases which, *when they arrived in Bakersfield and San Francisco, were damaged*, and that they were contaminated, unfit for human consumption and were a total loss. It is, therefore, inconceivable as to why the Court should have rendered judgment for 40 cases when, as a matter of fact, a total of 450 cases were damaged.

The defendant Belyea who opened the car found between 25 and 40 cases so soft that he could put his finger through the cartons. [Findings of Fact 16, Tr. p. 23.] Belyea believed all the cases were soft, and he tried to find refrigeration space to attempt to refreeze them and salvage what he could. There was no evidence that the cartons in the car were hard.

The evidence was and the Court found that Belyea called every refrigeration plant in Los Angeles and even as far as Pomona, in an attempt to find a plant to re-freeze the shrimp. He hesitated hauling the shrimp to Bakersfield and San Francisco when in his opinion the cartons of shrimp were already damaged. [Findings of Fact 18—Tr. p. 24.] But Belyea had no alternative. Not finding refrigeration space, he attempted to salvage what he thought could be salvaged and he did this by the only means at his disposal. He placed the shrimp in his refrigerated truck and moved the merchandise to the consignees at Bakersfield and San Francisco where they were rejected.

Belyea could have been less resourceful in his desire to salvage what he could from a bad situation. He could have refused to remove the shrimp from the car because

the car was warm and it was apparent that there was damage to the cartons of shrimp. He could have permitted all of the cartons to remain in the car to rot. There would then have been no question as to appellant's damage. But because Belyea attempted to prevent a loss to both appellee and appellant, the Court erroneously concluded that the appellant should not recover.

The Court undoubtedly came to the erroneous conclusion that since the 415 cases were not *visibly* spoiled, that therefore they were undamaged. If Belyea's truck were not of modern design and if Belyea's truck were unrefrigerated, this conclusion or inference might apply, but the facts as found by the Court are so contrary as does not warrant such an inference or such a conclusion.

The facts as found by the Court prevent such conclusion or any such inference. Whatever happened to the shrimp happened before the shrimp was unloaded in Los Angeles. This same refrigerated truck which hauled the shrimp from Los Angeles to Bakersfield and San Francisco also carried as part of its cargo frozen cauliflower and frozen broccoli. The frozen cauliflower and frozen broccoli arrived in Bakersfield and San Francisco hard and frozen and in good condition. If anything intervened from the time the shrimp was removed from appellee's freight car in Los Angeles and placed on Belyea's truck and the time it arrived in Bakersfield and San Francisco, that same act would have similarly damaged the cauliflower and the broccoli. They too required refrigeration and were frozen perishable commodities, the same as the shrimp. But still the facts are and the Court found that

the broccoli and cauliflower arrived in Bakersfield and San Francisco in good condition.

It is, therefore, only logical to conclude that since the shrimp arrived in Bakersfield and San Francisco in a damaged condition, but the cauliflower and broccoli on the same truck arrived in good condition, that the shrimp was in a damaged condition when it was placed in the truck, and the appellee is liable for this damage. Appellant should not be penalized because of an act of charity on the part of Belyea in attempting to salvage what he could, even though his attempt proved futile. The Court should have rendered judgment for appellant for all the cartons which were damaged, to-wit, 450 cartons.

The appellee Santa Fe failed to offer any evidence whatsoever of any act or thing or condition that could possibly have caused damage to the shrimp between the time it left Los Angeles and was received in Bakersfield and San Francisco. The appellant offered positive and uncontradicted evidence that nothing occurred between the time the shrimp left Los Angeles and the time it arrived in a spoiled condition in Bakersfield and San Francisco. The trial court found Belyea was not negligent. These findings were approved as to form by the appellee and they offered no other findings. The Court's reasoning, therefore, that something may have happened was not based on the evidence or facts, is contrary to its own findings and is based purely on supposition or conjecture. The Court erred in failing to give appellant judgment for its full loss.

II.

The Appellee Was Negligent in Permitting a Perishable Commodity to Remain in a Freight Car Over Which It Had Full Control and Jurisdiction without Icing for Sixty-Four Hours and Twenty-Five Minutes and This Neglect and Breach of Carriage Was the Proximate Cause of the Damage Which Appellant Suffered.

The Court found that though the car arrived in Los Angeles on April 10, it was first made available to the appellant on April 11, 1946. [Findings of Fact 11—Tr. p. 21.] The Court further found that no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946, and the time it was unloaded on April 11, 1946. During all of this time the car was in the possession of the appellee, Santa Fe. [Findings of Fact 12—Tr. p. 22.] The Court found that Los Angeles was a regular icing station [Findings of Fact 13—Tr. p. 32] and that the icing instructions required the appellee Santa Fe to ice and salt at all regular icing stations and oftener, if delayed. [Findings of Fact 6—Tr. p. 20.]

When the car left Chicago on April 2, 1946, the mean temperature for a 24-hour period was 41 degrees. When the car reached Savannah, Illinois, 26 hours and 45 minutes later, and with the temperature remaining the same, 3000 pounds of ice were added and a proportionate amount of salt. At each icing station thereafter, ice and salt were added. While the temperatures through the various cities through which the car passed enroute to Los Angeles remained at an average of approximately 60 degrees, 1166 pounds of ice were required and were added on an average of every 18 hours and 50 minutes. When the car reached San Bernardino on April 8, 1946, the maximum tempera-

ture was 62 degrees, the minimum temperature 47 degrees and the mean temperature 54 degrees. While the temperature remained relatively constant, the car required 1500 pounds of ice and this was added in San Bernardino.

The icing instruction required the carrier to ice this car at regular icing stations. Los Angeles is a regular icing station. [Findings of Fact 13—Tr. p. 22.] The instructions further required the carrier to ice oftener if delayed. [Findings of Fact 6—Tr. p. 20.] Though the car was in Los Angeles, a regular icing station, from April 9 to April 11, the carrier furnished no ice. The Court specifically found "that no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946 and the time it was unloaded on April 11, 1946 at the Bay Street Perishable Team Track in Los Angeles, which said track is owned by and under the control, supervision and jurisdiction of Santa Fe." [Findings of Fact 12—Tr. p. 22.]

From April 8, however, when the car left San Bernardino and April 11, when the car was available to appellant in Los Angeles, the temperature rose from 68 degrees to 88 degrees. Notwithstanding this sharp rise in temperature for a period of three days, no ice was added to this car. *For a period of 64 hours and 25 minutes, the appellee permitted this car to remain un-iced in a broiling sun.* Common logic would lead to only one conclusion—that the appellee Santa Fe negligently permitted this car to remain un-iced and unattended, with knowledge that the car contained a perishable food which required icing. This was negligence and the proximate cause of the damage.

When a properly refrigerated car is opened on a warm day, a rush of cold air escapes and a vapor is given off.

When the door of this car was opened, there was no rush of cold air and no vapor was given, though it was a warm day. This car was not properly refrigerated. It was warm.

The visible merchandise near the door was wet, soft and defrosted. [Findings of Fact 16—Tr. p. 23.] It was so soft that when Belyea placed his finger against the carton, his finger penetrated through the outer carton, the inner package and the shrimp creole itself. [Findings of Fact 16—Tr. p. 23.] The carton should have been frozen solid and as hard as a rock.

When Belyea noted the car was warm and the merchandise soft, he immediately obtained a thermometer, placed it in the car, closed the doors and permitted the thermometer to remain there for fifteen minutes to determine the temperature of the car. [Findings of Fact 16—Tr. p. 23.] While the temperature of the car should have been 5 degrees, the temperature of the car was actually 54 degrees. The merchandise had already defrosted and spoiled.

The Court found that the carrier permitted the car to remain without icing for 64 hours and 25 minutes. This evidence, coupled with the fact that the appellee produced no contrary evidence and the finding of the Court that the shrimp was a total loss, established without a doubt the negligence of the appellee. The appellee was unable to show that the damage resulted from acts beyond its control such as an act of God, public enemy or the inherent nature of the goods themselves. The failure to meet this burden of proof warranted a recovery in favor of the appellant.

Appellants called Raymond C. Spoelstra as an expert witness. Mr. Spoelstra is a chemist and part owner of

a food service laboratory which does analytical work for food processors. He is experienced in bacteriological work and particularly on making chemical and bacteriological tests and examinations. This highly skilled expert testified that *frozen shrimp cannot be kept at a temperature above 20 degrees* and that if it is so kept, it starts deteriorating; that when the temperature reaches 25 degrees above zero, it approaches a very dangerous situation, and that frozen shrimp begins to defrost at between 20 and 25 degrees. [Tr. p. 111.]

He testified that *once a perishable food product such as frozen shrimp creole is defrosted, it cannot again be frozen and its quality restored*. He testified that if frozen produce is once defrosted and it is refrozen, one would be running into a terrific risk of putting a product on the market that is substandard. [Tr. p. 111.] He further testified that *if a defrosted food is refrozen and put on the market for sale, that when it is sold to the consumer, the merchandise will be off color and will be off flavor and off odor*, and further, that there is a great danger and possibility of bacteriological poisoning. [Tr. pp. 111-112.]

Mr. Spoelstra made various tests prior to his appearance in court. He testified that a package of frozen shrimp put into the refrigerator at 8 degrees below zero would completely defrost in the refrigerator itself in eleven hours if the refrigerator maintained a temperature of 40 degrees. In his experiment he found that after an eleven hour period in a temperature of 40 degrees, the juice was running out of the package. This testimony was not controverted nor was there any evidence offered in opposition to it. [Tr. pp. 110-111.]

The Court in its opinion reasoned that since 550 cases of shrimp were used by one of the consignees "they were in good condition." [Tr. pp. 15-16.] This reasoning is fallacious, unsound and contrary to the findings. There was no finding that the 550 cartons accepted by the consignee Pic'N'Time Frozen Foods were "in good condition." It is true that they were used in the course of trade but there was no evidence that they were in good condition. Since it is undisputed that 25 to 40 cartons were completely spoiled and that 415 cartons arrived at Bakersfield and San Francisco in a damaged condition and unfit for human consumption, it is fallacious to infer that the 550 cases disposed of in the course of trade were in good condition. The shrimp which was disposed of was not of first quality because it was refrozen. Mr. Dominis testified the shrimp was refrozen and Mr. Spoelstra testified that once a defrosted shrimp product is refrozen it lacks flavor, color or odor. There being no contrary evidence the Court must accept these facts as true.

Certainly the appellant should not be required to test each individual carton to determine its quality. The Court already found 450 cases to be damaged and not fit for human consumption. The fact that a portion was so visibly bad as to be deteriorated and rotten would cause suspicion to fall on the remainder of the merchandise rather than an inference that the remainder in the same car is good. If the car was improperly iced and a part of the merchandise was visibly rotten, the only reasonable deduction is that all of the merchandise in the car was affected. Since the shrimp was disposed of by the jobber to a wholesaler who in turn disposed of it to a retailer and eventually a consumer, it is impossible to determine what complaint was actually registered by the consumer.

By way of illustration, one may use a defective automobile tire for many miles without trouble but the fact that the tire is used without trouble does not establish that the tire was not defective. The defect may be unknown to the seller as well as to the buyer and still this does not establish that the tire was free from defect. If at a subsequent time the tire would blow out and it would appear that it was the result of a defect in the tire itself, we could properly conclude that this existed at the time the tire was placed on the car.

The fact that 550 hand-picked cartons of shrimp were actually disposed of in the trade is no indication that these 550 cartons were not spoiled. The witness Mr. Dominis testified that he told Belyea he wanted only hard cases. [Tr. p. 149.] Belyea testified and the Court found *he hand-picked the 550 cartons Dominis received*. [Findings of Fact 17—Tr. p. 24.] Dominis testified those which he received were immediately put in storage and frozen and moved or consumed in the regular channels within 45 to 60 days, as the item was scarce at the time. [Tr. p. 149.] They were disposed of without examination or chemical analysis of their condition or quality.

From these facts we cannot assume that the merchandise received by Dominis was of the quality of the product which the plaintiff used in its trade or business, because the undisputed testimony of the expert Spoelstra was to the effect that when a frozen food such as shrimp is defrosted it cannot again be frozen and still maintain its quality, its flavor or its fragrance. The mere fact that merchandise was used or was not spoiled to the degree where it was dangerous does not mean that the merchandise was unspoiled. The proper inference and conclusion to be drawn from these facts is that the mer-

chandise was bad and damaged, but that notwithstanding this condition, it was disposed of in the regular course of trade.

As heretofore pointed out, the shrimp creole taken from appellee's car was placed in a refrigerated truck which also contained frozen broccoli and frozen cauliflower. It was a modern, insulated, mechanically refrigerated truck and it was the uncontroverted testimony that the truck was capable of holding the temperature of any commodity placed in the truck and of reducing the temperature of the commodity if the temperature of the commodity was twenty-five degrees or greater. The frozen broccoli and frozen cauliflower arrived in Bakersfield and in San Francisco in good condition. The shrimp creole was rejected. Since the evidence was that nothing intervened between the time the shrimp left Los Angeles and the time it arrived in Bakersfield and San Francisco, the shrimp creole must have been damaged when it was delivered to appellant in Los Angeles. If we reasoned otherwise, we can find no explanation why the frozen broccoli and frozen cauliflower were received in good order when the shrimp creole in the same car arrived in a damaged condition and not fit for human consumption.

Since it is undisputed and the Court found that twenty-five to forty cartons of shrimp were so spoiled when the car was opened in Los Angeles as to be permitted to remain in the carrier's car as garbage to rot, we can only conclude that all of the shrimp which was delivered to the appellant in Los Angeles was damaged.

It is the undisputed law that where the shipper delivers a perishable food to a carrier for reshipment and where the perishable commodity arrived in a damaged

condition, the carrier owes the burden of proof to establish that he was free from neglect.

In the case of *Wilson & Co. v. Werner Transportation Co.*, 329 Ill. App. 533, 69 N. E. (2d) 713, in an action against a carrier where the evidence showed that the carrier left the vehicle overnight without icing, it was held that that was sufficient evidence to warrant recovery against the carrier.

III.

The Appellee Breached Its Contract of Carriage and the Negligence of the Appellee in Transporting the Merchandise Shipped by the Appellant Was the Proximate Cause of the Damage Suffered by Appellant.

It must be remembered that the merchandise was in the possession of the carrier until it was actually removed by the consignee. The carrier's obligations under its bill of lading continued until the shipment was actually removed by the consignee.

In the case of *Michigan Central Railroad Co. v. Mark Owen*, 256 U. S. 427, the Court held that where a carrier places a car on a public delivery track, no delivery has been made to the consignee until the merchandise in the car is actually removed by the consignee and this notwithstanding the fact that notice was given the consignee who accepted the car, broke the seals and started to unload. Under such circumstances, only access to the merchandise has been given and there is no delivery of property still in the car;

only a right that it may be removed. The railroad company remains liable as a carrier until such time as the property is actually removed.

Under the provisions of the Uniform Bill of Lading that property not removed within 48 hours after notice of its arrival may be kept in the car, depot or place of delivery, subject to the carrier's responsibility as warehouseman, the carrier's liability as carrier continues during the 48-hour period, unless the property is actually removed within that time. This rule applies notwithstanding the fact that the car is accepted by the consignee, the seals broken and unloading commenced. *Michigan Central Railroad Co. v. Mark Owen & Co.*, *supra*. Even after the 48-hour period during which the consignee may permit the goods to remain in the car, the railroad company is liable under its bill of lading as a warehouseman for loss of goods from a car standing on its side track awaiting removal by the consignee. A railroad acting as warehouseman (as where the goods are permitted to remain in the car after the 48-hour period) is obligated at all times to protect property entrusted to its care. *United Metals Selling Co. v. Pryor*, 243 Fed. 91, *Lehigh Valley Railroad Co. v. State of Russia*, 21 F. (2d) 406.

Since the car was in the possession of the carrier until the merchandise was removed on April 11 and, since no ice or salt was added from the time the car left San Bernardino on April 8 until the time it was unloaded in Los Angeles on April 11, 64 hours and 25 minutes later,

with a temperature in Los Angeles of 88 degrees, the natural conclusion to follow is that the carrier failed to properly protect the merchandise in its custody. The damage was caused by the neglect of the carrier for which the carrier is liable. The Court found that a total of 450 cartons were damaged, contaminated and not fit for human consumption (35 left in the car and 415 removed to Bakersfield and San Francisco), and, therefore, the appellant should recover for the whole thereof which damages were stipulated to be in the sum of \$4455, plus the loss of freight in the sum of \$269.75.

In the case of *Southwestern Railroad Company v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, the Court held that the removal of a part of the goods included in an interstate shipment does not discharge the carrier's liability under the bill of lading. The liability of the carrier remains until the entire shipment is removed.

Under the law in this case, even if the 550 cases which Pic'N'Time Frozen Foods received were undamaged, which we do not concede, since the remainder of the lading remained in the possession of the carrier until removed by the consignee, the defendant was liable for any damage to the remainder of the lading in the car. This consisted of 35 cases left in the car as too spoiled to move and 415 cases which the Court found were damaged upon arrival in Bakersfield and San Francisco. Appellant therefore is entitled to recover its total loss, the defendant having failed to maintain its burden of proof that it was free from negligence.

IV.

The Amount Allowed to the Appellant for Damages Is Inadequate, Unreasonable, Arbitrary and Is Contrary to the Findings of Fact and the Weight of the Evidence. The Court Should Have Granted Judgment for the Full Damages Sustained.

In the instant case, the Court having found that the shrimp was delivered to the carrier in a good and frozen condition and the Court having found that some of the merchandise arrived at its destination damaged, the burden was on the appellee to show that either there was no damage or that it was free from neglect. The appellee failed to maintain this burden of proof. The appellee introduced no evidence which in any way showed that the shrimp creole rejected in Bakersfield and San Francisco was undamaged, uncontaminated or salable when it was delivered to appellant in Los Angeles. On the contrary, *the appellee stipulated and the Court specifically found that this shrimp creole arrived in Bakersfield and San Francisco in a damaged condition and that it was contaminated and not fit for human consumption, and that there was a total loss of \$4,455.00, plus loss of freight in the sum of \$269.75.*

Since there was no finding that the appellee was free from negligence and the Court having found that the shrimp was damaged, the appellant should have had judgment for its total loss.

The conclusions of law labeled in the Findings of Fact and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6, 7, 8 and a portion of 9 were erroneously labeled Conclusions of Law. They should have been labeled Findings of Fact and considered as such.

It is immaterial that findings of fact are found among conclusions of law. If it is a finding of fact, it should be so treated by an appellate court. *Lindberg v. Stanto*, 211 Cal. 771, 776, 297 Pac. 9, 75 A. L. R. 555; *Gossman v. Gossman*, 52 Cal. App (2d) 184, 191, 126 P. (2d) 178; *Lockard v. City of L. A.*, 85 A. C. A. 202, 192 P. (2d) 110.

The conclusions of law drawn from the facts as found by the Court were erroneous and the Court erred in giving appellant damages for *only the visibly spoiled merchandise*. It should have given appellant damages *for all of the damaged merchandise*, that which was visible and that which was subsequently ascertained to be damaged. It is apparent that the findings of fact are in conflict with the conclusions of law and the judgment.

The Court in its Conclusion of Law No. 8 [Tr. p. 28] found "that the only visible damage was to 40 cases of shrimp creole." It infers that there may have been damage to additional cases, but that the damage was not visible and this inference is cured by the finding No. 21 [Tr. p. 25] which found that 415 cartons were damaged. Again, Conclusion 9 [Tr. p. 28] stated "Since only 40 cases were *visually discovered to be damaged* at the time the merchandise was taken from the car in Los Angeles" (italics ours), it is apparent that the Court was of the opinion that the balance of the shrimp creole was damaged but that it was not "*visually discovered to be damaged at the time the merchandise was taken from the car in Los Angeles.*" This conclusion when read together with

Finding 21 [Tr. p. 25] "*that 415 cartons were received at Bakersfield and San Francisco in a damaged condition, and was contaminated and was not fit for human consumption,*" can lead to only one conclusion—that the 415 cartons were damaged, but the damage was not visually discovered when the merchandise was taken from the car. The damage was, however, discovered shortly thereafter when the merchandise was examined in Bakersfield and San Francisco. This, read in the light of the facts as found by the Court, to-wit, that the car arrived in Los Angeles at a temperature of 54 degrees; that the car appeared warm; that there was no rush of cold air or vapor which usually appears when the door of a properly iced and cooled car arrives on a warm day; that from 25 to 40 cartons were so wet, soft, defrosted and spoiled as to be rotten, can lead to only one conclusion, that the appellant is entitled to judgment for the full amount of its damages as found by the Court.

For the trial court to have allowed damages for 40 cases of shrimp, it must have concluded that the appellant made out a *prima facie* case and that appellee failed to sustain its burden of proof that it was free of negligence. Any other reasoning or conclusion would have prevented appellant's obtaining any recovery. If such negligence existed, and the trial court found that it did, such negligence must apply to all of the lading in the car which appellees stipulated and the trial court found was damaged. This consisted of 450 cartons and not only those left to rot. Since it was stipulated that appellant's damage was \$9.90 per carton plus the loss of freight, appellant was entitled to judgment in the sum of \$4455.00, plus its loss of freight in the sum of \$269.75.

Conclusion.

The Court found that the appellant met its burden of proof that the merchandise was shipped in a good and merchantable condition and found that appellant made out a *prima facie* case when it presented evidence of the car arriving in poor condition, and the merchandise spoiled.

The burden then shifted to the appellee to show that the merchandise was undamaged or that it was free from negligence. This it failed to do. It was unnecessary for the appellant to prove that each and every case was damaged. The mere showing that there was visible evidence of a warm car with a high temperature of 54 degrees and that there was damage to some of the cartons of shrimp creole shifted the burden to the appellee to prove that the merchandise was not damaged. This the appellee failed to do.

Since the Court specifically found that 450 cases were damaged and that the appellant's damage thereby was \$4455.00 plus its loss of freight in the sum of \$269.75, it therefore follows that the Court improperly fixed the damages of the appellant and that the appellant is entitled to recover for its total loss of \$4,724.75; and we respectfully submit that judgment should be entered in favor of the appellant and against the appellee Santa Fe, in said amount, together with interest from April 2, 1946 and costs of suit.

Respectfully submitted,

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By ALBERT H. ALLEN,

Attorneys for Appellant.



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—a—

No. 11961.

PAUL P. O'BRIEN,

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Appellees.

PLEADINGS AND JURISDICTIONAL STATEMENT.

The complaint of the appellant, Hamilton Foods, Inc., against the appellees, the Atchison, Topeka & Santa Fe Railway Company and Jack Belyea, doing business as Refrigerated Express Company, alleges the necessary jurisdictional facts as follows:

That appellant is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business in that state. That the defendant appellee, Santa Fe, is a corporation organized and existing under the laws of the State of Kansas and having its principal place of business in Los Angeles, Cali-

fornia. That the defendant, Jack Belyea, is a resident of the City of Los Angeles, State of California. That the matter in controversy exceeds, exclusive of costs, the sum of three thousand dollars (\$3,000.00) and the jurisdiction of the United States District Court for the Southern District of California, Central Division, is invoked on the grounds of diversity of citizenship.

That the defendant appellee, Santa Fe, is a common carrier engaged in the business of carrying merchandise in interstate commerce. That in the course of its business, it issued a bill of lading to the plaintiff for the carriage of one thousand (1,000) cartons of frozen vegetables and shrimp. That it was negligent in transporting said lading and did not comply with the terms of the bill of lading in transporting said lading. That by reason of the negligence of the appellee, Santa Fe, and its breach of its contract of carriage as set forth in the bill of lading, the appellant was damaged in the sum of \$4,455.00, being the reasonable value of the merchandise damaged, and in addition thereto, the sum of \$294.75 for freight for hauling said merchandise.

The complaint contains a second cause of action against the defendant Belyea for failing to properly trans-ship the shrimp creole from Los Angeles, California, to Bakersfield and San Francisco. [Tr. pp. 2-7.]

The appellee, Santa Fe, filed an answer which denied on information and belief the plaintiff's place of business, but admitted that it was a Kansas corporation, that it was a common carrier of freight between Chicago, Illinois and Los Angeles, California and admitted that it received from the plaintiff at Chicago, Illinois one thousand (1,000) cartons of vegetables and shrimp for trans-

portation to Los Angeles. The answer denies negligence on the part of the appellee or violation of the terms of the bill of lading, as well as setting forth other defenses. [Tr. pp. 7-11.]

The answer of the defendant Belyea likewise denies all liability, but admits that the appellant is an Illinois corporation and that the appellee defendant, Santa Fe, is a Kansas corporation with its principal office in Los Angeles. In addition, the defendant Belyea alleges that he is a resident of the City of El Monte, California. [Tr. pp. 11-13.]

The trial court found that the appellant is an Illinois corporation with its principal place of business in Chicago, Illinois, that the appellee, Santa Fe, is a Kansas corporation with its principal place of business in Los Angeles, California, and that the defendant Belyea is a resident of the City of El Monte, County of Los Angeles, State of California. [Finding 1, Tr. p. 18.]

That the United States District Court for the Southern District of California, Central Division, had jurisdiction to try the herein action by reason of Act of April 20, 1940, Chap. 117, 54 Stat. 143, 28 U. S. C. A., Sec. 41(1).

This Honorable Court has jurisdiction of this appeal in that it is sought to review by appeal a final decision of a District Court of the United States for the Southern District of California, Central Division, which is within the Ninth Circuit. (Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 936, 28 U. S. C. A., Sec. 225, as amended May 9, 1942, Chap. 295, 56 Stat. 272.)

CONCISE ARGUMENT OF THE CASE.

We submit that, stated most briefly, the position of the trial court should have been this:

I.

The appellant, Hamilton Foods, Inc., delivered to the appellee, Santa Fe, 1,000 cases of frozen shrimp creole in a good, frozen and merchantable condition for carriage to Los Angeles, California, in a refrigerated car. That the car was initially and properly iced by the appellant.

II.

That the appellee, Santa Fe Railway, failed and neglected to carry the lading properly and negligently failed to ice and salt the lading as required by the terms of the bill of lading.

III.

That 450 cartons of the lading arrived in Los Angeles in poor condition, unfit for human consumption. That the damage to the goods was caused by the negligence of the appellee, Santa Fe, in failing to properly carry the lading in accordance with the contract of carriage and in failing to properly ice and salt the lading in accordance with the instructions of the appellant.

IV.

That the appellant is entitled to judgment against the appellee, Santa Fe, in the sum of \$4,455.00, being the reasonable value of the lading damaged, together with the cost of freight thereon in the sum of \$294.75, plus interest from April 1, 1946, at the rate of seven per cent (7%) per annum.

SPECIFICATION OF ERRORS.

It is respectfully submitted that since the Court found:

(a) That the shrimp creole was in a good and frozen condition when delivered to the carrier [Findings 4, 5, 6, 7 and 8, pp. 19-21], and

(b) That the shrimp creole arrived in a car which was warm and had a temperature of 54 degrees, and that the visible cartons of shrimp near the door were wet, soft, defrosted and spoiled [Finding 16, pp. 23-24], and

(c) That upon arrival in Los Angeles, 415 cartons were transported in a refrigerated truck to Bakersfield and San Francisco, which truck was in good working order, properly insulated, with good mechanical refrigeration [Findings 19, 20, 21, pp. 24-26], and

(d) That this truck which transported the shrimp creole to Bakersfield and San Francisco likewise carried frozen cauliflower and frozen broccoli, which was received and accepted in Bakersfield and San Francisco in a good and frozen condition [Finding 19, pp. 24-25], and

(e) That 415 cartons arrived in Bakersfield and San Francisco in a spoiled condition and not fit for human consumption [Finding 21, p. 25], and

(f) That there was no negligence on the part of the defendant Belyea who trans-shipped the shrimp from Los Angeles to Bakersfield and San Francisco [Finding 24, p. 26], and

(g) That the appellant established a *prima facie* case [Conclusion of Law 1, p. 26].

The Court erred in its conclusion:

(a) That the appellee was liable only for the 25 to 40 cartons which were visibly spoiled and rotten [Conclusion of Law 9, p. 28];

(b) That the appellee was not liable for the damage to the 415 cartons which the Court found were received in Bakersfield and San Francisco in a damaged condition and not fit for human consumption [Conclusion of Law 9, p. 28];

(c) In concluding that it was necessary to make full discovery of the damaged cartons immediately upon making the lading available to appellant [Conclusion of Law 9, p. 28].

(d) In its conclusion that since the merchandise was re-shipped from Los Angeles to Bakersfield and San Francisco, and having arrived there in a damaged condition, from the circumstances, it would appear that the Railroad Company complied with the protective tariff regulations and with the bill of lading under which it was governed in delivery of the shipment to its track in Los Angeles [Conclusion of Law 7, p. 28];

(e) In giving appellant damages for only forty (40) cartons visibly spoiled when the Court by its Findings of Fact and Conclusions of Law found that a total of 450 cartons of shrimp creole were spoiled and that appellant suffered damages of \$9.90 per carton or a total of \$4,455.00, plus freight in the sum of \$294.75 [Conclusion of Law 9, p. 28].

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC., a corporation,

Appellant.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYE, doing business as Refrigerated Express Company,

Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

APPELLEE'S REPLY BRIEF and CROSS-APPELLANT'S OPENING BRIEF.

ROBERT W. WALKER,

LOUIS M. WELSH,

448 Santa Fe Building, Los Angeles 14

Attorneys for Appellee and Cross-Appellant.



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Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

Basis of Jurisdiction.

Appellant in its Opening Brief has set forth the bases of jurisdiction of the trial court and of this court. We adopt, as our own, appellant's statements concerning the bases of jurisdiction.

Statement of Facts.

Appellant in its Opening Brief has, in part, misstated the facts, and for that reason additional facts are set forth.

One thousand cartons of shrimp creole were shipped from Chicago, Illinois, to Los Angeles, California, pursuant to a straight bill of lading contract entered into between the shipper-appellant and the originating carrier, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company [Pltf. Exs. 1 and 5].

The railroad car (ERDX 2667) arrived in Los Angeles on schedule on April 9, 1946, at 3:40 a. m. [Tr. pp. 122, 124]. On April 9, 1946, notice of the arrival of the car was mailed to the consignee, Gouley Burcham & Co [Def't. Ex. B]. Jack Belyea, trucker and agent for the consignee, was notified by telephone of the arrival of the car on April 10, 1946 [Tr. p. 139].

On April 11, 1946, Jack Belyea broke the seals on the car door and opened the doors [Tr. pp. 69, 139]. Belyea testified that after opening the car door he saw 25 to 40 soft cases of shrimp creole in and around the doorway [Tr. pp. 75, 81]. Mr. Belyea then took the *air* temperatures in the car above the lading and below the lading. He did not take the commodity temperatures [Tr. p. 95]. Belyea examined the ice bunkers in the railroad car [Tr. p. 98]. He did not request the railroad to further ice the bunkers [Tr. p. 99]. Mr. Belyea did not have the shrimp creole examined in Los Angeles to determine whether or not it was fit for human consumption. No samples were submitted to any laboratory or to the United States Department of Agriculture [Tr. p. 101].

Belyea then delivered 450 cartons—not 550 as stated in Appellant's Brief, page 4—to Pic'N'Time Frozen Foods in

Los Angeles [Tr. pp. 74, 148, 149]. He delivered 100 cartons to Gaydens, Incorporated, in Los Angeles. Some soft cartons were included in the 100 cartons which Gaydens received [Tr. pp. 91, 103]. Appellant makes no claim for damage to the 550 cartons delivered at Los Angeles [Tr. p. 59]. The 450 cartons received by Pic'N'Time arrived undamaged, in good condition, and were sold to the public through regular trade channels [Tr. pp. 59-60, 150-151]. Appellant's statement on page 4 of its Brief that "the local merchant who was to receive 550 cartons endeavored to salvage what he was to receive" is grossly misleading.

Mr. Belyea stated that, in his opinion, none of the cartons in the refrigerator car (with the possible exception of 25 to 30 cases) would have been damaged if they had been put into a cold storage warehouse in Los Angeles [Tr. p. 82].

After the cartons of shrimp creole were delivered to the Los Angeles consignees, Mr. Belyea loaded his truck with all the remaining cartons in the railroad car [Tr. pp. 75, 77]. It took 40 to 45 minutes to load Belyea's refrigerator truck. During that time the doors of the railroad car were open [Tr. p. 99]. Belyea delivered 365 cartons in San Francisco, 50 cartons in Bakersfield, and some of the cartons, "a small amount," at Sacramento [Tr. p. 95]. Appellant makes no claim for damage to the cartons delivered at Sacramento.

Since 550 cartons were delivered in Los Angeles, 365 at San Francisco and 50 in Bakersfield, or a total of 965 cartons, it follows that 35 cartons of shrimp must have been delivered to consignees in Sacramento. Although appellant states that 35 cartons of shrimp were never removed from the railroad car (App. Br. pp. 5, 6, 8, 18

and 21), there is no support for this statement in the record. At page 75 of the Transcript, Mr. Belyea states:

“The soft merchandise, that was apparently all gone, we left in the car. I would estimate there were somewhere between 25 and 40 cases. The 25 to 40 cases which we didn't touch at all we just left in the car *until the reefer arrived.*” (Italics supplied.)

At page 91 Mr. Belyea states:

“* * * I did put some of the soft cartons in my car. *As to the rest of them, Gaydens, Incorporated,* got a few soft cartons in their 50-case shipment.” (Italics supplied.)

In addition to the icing record indicated on pages 2 and 3 of Appellant's Opening Brief, the record discloses the following:

(1) When the railroad car arrived in Los Angeles at 3:40 a. m., April 9, 1946, the ice bunkers were 98% full of ice and the bunker vents and plugs were in [Tr. pp. 122, 128];

(2) On July 10th at 8 a. m. the bunkers were inspected and found to be 85% full of ice. At that time the car was at the Bay Street Team Track. The vents and plugs were in [Tr. pp. 122, 128];

(3) On April 11, 1946, the day the car was unloaded, the bunkers were 75% full of ice [Tr. pp. 141, 98].

Appellant states on page 3 of its Brief that Los Angeles is a regular icing station. Los Angeles is not a regular icing station on destination traffic, if the bunkers

are $\frac{3}{4}$ full of ice when the car arrives [Tr. pp. 125, 136; Deft. Ex. C, Rule No. 225]. If the consignee wishes to ice the car at destination prior to the time the ice falls below 75% of bunker capacity, then he can and must specifically order the railroad to do so [Tr. p. 135].

The record does not support appellant's statements at pages 3, 4 and 14 of its Brief that the temperature of the car upon arrival at Los Angeles should have been 5° or less.

Appellant states that the parties hereto stipulated that 415 cartons were damaged when they arrived at Bakersfield and San Francisco (App. Br. p. 9). Such is not the fact. Page 3 of Plaintiff's Exhibit 1, paragraph V, reads as follows:

"The plaintiff has sustained the following loss: 365 cartons were found to be unfit for human consumption in San Francisco, California. 50 cartons were found to be unfit for human consumption in Bakersfield, California."

The stipulation does not indicate, nor was it intended to indicate, that the shrimps were found to be damaged upon arrival at Bakersfield and San Francisco. The testimony brought out at the trial indicates that 40 cases were soft upon arrival at *San Francisco*. The rest of the cases were hard, but the San Francisco consignee took a blanket exception on the whole lot, because 40 cases were visibly soft [Tr. pp. 85-86, 88].

ARGUMENT.

I.

Appellant Failed to Prove That More Than 25 to 40 Cases of Frozen Shrimp Creole Arrived at Los Angeles Damaged.

For the purposes of this Reply Brief it is unnecessary to discuss appellant's charge that this appellee was negligent. The only question raised on appellant's appeal is whether or not the court awarded sufficient damages.

In order to establish a *prima facie* case in an action involving damage to goods in transit, the plaintiff must prove that the merchandise was delivered to the carrier in good condition and received from the carrier *at destination* in a damaged condition. (*Ohio Galvanizing & Mfg. Co. v. Southern Pacific Co.*, 39 F. 2d 840 (C. C. A. 6, 1930), *cert. den.* 282 U. S. 879.)

Appellant first contends that the Conclusions of Law and Judgment are not supported by the Findings of Fact because the court found that 415 cartons of frozen shrimp were damaged, but awarded Judgment for only 40 cartons. Appellant has neglected to point out that only 25 to 40 cartons were found damaged at Los Angeles. The other damage was found at points distant from Los Angeles and at times unknown to this appellee.

To establish a case against the railroads, it is not sufficient for appellant to show that its merchandise was found to be damaged at Bakersfield and San Francisco, California. Appellant must prove that the merchandise was damaged at Los Angeles, the terminus of the rail shipment. (*Julius Klugman's & Sons v. Oceanic Steam Navigation Co.*, 42 F. 2d 461 (D. C. N. Y., 1930); *McCreedy et al. v. Holmes*, 15 Fed. Cas. No. 8,733 at p. 1347.)

The evidence introduced at the trial discloses the following:

(1) Appellee and its connecting carriers were obligated under the terms of the bill of lading contract to deliver the carload of shrimp creole to Los Angeles [Pltf. Ex. 5];

(2) 25 to 40 cases arrived in Los Angeles soft and partially defrosted [Tr. p. 75];

(3) No analysis of the shrimp creole was made at Los Angeles to determine whether or not it was fit for human consumption [Tr. p. 101];

(4) More than 500 cases delivered at Los Angeles were undamaged and were disposed of in the ordinary course of trade [Tr. pp. 59, 74, 148-149];

(5) No damage would have occurred to any of the cases (with the possible exception of 25 to 40 cases) if they had all been placed in cold storage in Los Angeles [Tr. pp. 75, 82];

(6) Refrigerator cars may arrive in good condition with the contents thereof thoroughly frozen and yet a few cases in and around the doorway may be soft and defrosted [Tr. p. 152];

(7) Some (probably 35) cases were delivered to consignees in Sacramento and no claim is registered by appellant for these cases [Tr. p. 95].

Thus, there is no proof of damage to more than 25 to 40 cases at Los Angeles; there is, however, affirmative proof that the carload was in good condition when it arrived in Los Angeles.

Mr. Belyea testified that he was operating as a common carrier by truck in the State of California and was authorized to so operate by the Interstate Commerce Com-

mission and the Public Utilities Commission of the State of California [Tr. pp. 90-91]. It is extremely unlikely that a man, well aware of his responsibilities to the public, would place 450 cartons of damaged shrimps into his truck to deliver them to points as far north of Los Angeles as San Francisco. The mere fact that Belyea accepted the 450 cartons is evidence that those cartons were in good condition when they arrived in Los Angeles.

In the case of *Julius Klugman's & Sons v. Oceanic Steam Navigation Co.*, 42 F. 2d 461 (D. C. N. Y., 1930), plaintiff brought an action to recover for the loss of furs transported from London to a warehouse in New York. The furs were shipped by sea from London to New York. They were unloaded from the ship at New York and placed upon a truck which transported them to the warehouse. One week after the furs had arrived at the warehouse they were inspected, and it was then discovered that some of the furs were missing from one of the packages. Plaintiff joined as defendants the navigation company, the trucking company and the warehouse. The court stated at page 462:

“As for the [water] carrier, the most that can be said is that the loss might have occurred while the furs were in its custody. It is equally possible that the theft took place later, during the week while the furs were in the warehouse. The damage suffered by the plaintiff is undoubted, but as between carrier and warehouseman, there is no indication as to where the loss occurred. The burden of proof is on the plaintiff to show non-delivery by the carrier. It is not sufficient to prove a state of facts as consistent with the occurrence of the loss after delivery by the carrier as before delivery.”

In *McCready et al. v. Holmes*, 15 Fed. Cas. No. 8,733 at page 1347, the court stated at page 1348:

“And if it should be, that after the carrier had parted with his possession of the property, it has been in the possession and control of other agents of the consignee; the reason for exonerating the carrier increases in proportion to the number of such agents, the length of time for which they were in possession; and the opportunities they enjoyed to diminish the quantity for which the carrier was liable.”

The court further states at page 1348:

“But the consignee has not the right to accept a delivery of the goods, commit them to his agents, examine them without notice to the carrier, and charge the carrier with a loss alleged to have been thus subsequently ascertained, upon such proof as excludes all reasonable probability of the loss having happened except in the hands of the carrier.”

The court states at page 1349:

“The coal was carted, after it was landed, to some distance, and then weighed. The carts were under the control of the agents of the consignee. It is quite as reasonable to infer that the loss happened while the coal was under the care of the agents of the consignee, as while it was under the charge of the carrier.”

And again the court states:

“So in this case, the carrier has landed the coal: and at the wharf, made delivery of it to the consignee. The consignee intending to cart it elsewhere, and to weigh it, must do so at his own expense and risk. If loss or damage occurs in that transportation, the consignee must bear it.

“* * * If the consignee, without notice or qualifying his acceptance, receive, as in this case, coal; commits it to his agents, in whose charge it may be lost, as well at least as while it was in the charge of the carrier; and rests the proof of loss by the carrier upon evidence which does not render it more probable that the loss was chargeable to the carrier, than to his own agents,—a case is presented in which I am not at liberty to make the carrier liable.”

Appellant has set forth several arguments to support the proposition that all the damaged cartons were damaged when they arrived at Los Angeles. We shall discuss these arguments *seriatim*.

First: Appellant contends that since the broccoli and cauliflower in Belyea's truck arrived frozen in San Francisco it follows that no casualty occurred which could have damaged the shrimp (App. Br. p. 18). Appellant's evidence discloses that shrimp creole will defrost at temperatures upward of 20° to 25°, a temperature well below the freezing point of water [Tr. pp. 110-111]. There is, however, no evidence to indicate the freezing points for broccoli and cauliflower. If broccoli and cauliflower can be frozen at 32° F., then it is possible that the shrimp could have been damaged while in Belyea's truck, although the broccoli and cauliflower arrived on the same truck in a frozen condition.

The evidence introduced at the trial of this action disclosed that it took from 40 to 45 minutes to load Belyea's truck before it departed for points north [Tr. p. 99]; that

the lading was transported from Los Angeles to San Francisco via the San Joaquin Valley during the month of April; that portions of the contents of the truck were unloaded at Bakersfield and Sacramento and that the car doors were necessarily open during such unloading process; that the car arrived in San Francisco too late to make delivery and that the truck was then sent to San Jose where the truck doors were again opened so that additional dry ice could be inserted therein [Tr. p. 95]. Mr. Belyea testified that he did not know when the shrimps were actually deposited in the warehouse in San Francisco [Tr. p. 96]. This indicates that the damages sustained by appellant not only could have been, but undoubtedly were, incurred subsequent to the termination of the rail movement.

Second: Appellant, at page 15 of its Brief, stresses the testimony of Mr. Spoelstra and concludes therefrom that all the merchandise delivered in Los Angeles was damaged. Mr. Spoelstra testified that shrimps will defrost at temperatures upwards of 20° to 25° F. [Tr. pp. 110-111]. His testimony concerning the condition of shrimps was predicated upon the assumption that the shrimp itself was maintained at a temperature upwards of 20° to 25° F. Appellee objected to the hypothetical question put to Mr. Spoelstra on the ground that the evidence introduced at the trial did not indicate at what temperature the shrimps were found when the car arrived at Los Angeles [Tr. pp. 113-118]. The evidence was that the *air* temperatures in the car were 50° and 54° after the car doors had been opened. The mere exposure of frozen

shrimp to an air temperature of 50° or 54° will not damage the shrimps unless the exposure is for a sufficient length of time to effect the temperature of the frozen shrimps. There is no dispute concerning this. Plaintiff's witnesses freely admit it [Tr. pp. 55, 67, 94, 118, 126, 156]. Appellant's statement on page 16 of its Brief that "Mr. Dominis testified the shrimp was refrozen * * *" is not true [Tr. p. 150].

Third: Appellant further contends that since the trial court did not find defendant Belyea negligent, it follows that any damage that occurred to the shrimp existed at the time the railroad car arrived at Los Angeles.

The trial court found that defendant Belyea was not negligent because appellant failed to prove him negligent. It was appellant's duty, under the law, to prove its case against defendant Belyea. This it did not do, because Belyea was bankrupt. Appellant only retained Belyea as a nominal defendant so that it could examine him as if on cross-examination [Tr. p. 68].

Fourth: Appellant in its Brief at page 22 states:

"The appellee introduced no evidence which in any way showed that the shrimp creole rejected in Bakersfield and San Francisco was undamaged, uncontaminated, or salable when it was delivered to appellant in Los Angeles."

Appellant has misconceived the burden of proof. It is appellant's duty to prove that the goods arrived in a damaged condition, not appellee's duty to prove that they arrived in good condition. (*Atlantic Coast Line R. Co. v. Enterprise Oil Co.*, 211 Ala. 676, 101 So. 605; *A. A. A. Highway Express, Inc., v. Bone & Hendrix*, 69 Ga. App. 763; 26 S. E. 2d 658.)

II.

The Findings of the Trial Court Will Be Upheld Upon Appeal Unless They Are "Clearly Erroneous."

There is substantial evidence to support the trial court's findings that only 40 cases of shrimp creole arrived at Los Angeles damaged [Tr. p. 28, Conclusions of Law No. 8].

In cases where a jury is waived the judgment of the trial court has the force and effect of the verdict of a jury, and the judgment will not be reversed where there is substantial evidence upon which to base it. (*Independence Indemnity Co. v. Sanderson*, 57 F. 2d 125 (C. C. A. 9, 1932); *Burkhard Investment Co. v. United States*, 100 F. 2d 642 (C. C. A. 9, 1938).) The trial court's findings are not to be disturbed on appeal unless they are clearly erroneous. (Rules of Civil Procedure for the District Courts, Rule 52(a), 28 U. S. C. A. following §723(c); *Occidental Life Ins. Co. v. Thomas*, 107 F. 2d 876 (C. C. A. 9, 1939); *United States v. Cushman*, 136 F. 2d 815 (C. C. A. 9, 1943); *Wittmayer et ux. v. United States*, 118 F. 2d 808 (C. C. A. 9, 1941).) In the *Wittmayer* case this court stated at page 811:

"As was said by Mr. Justice Holmes in *Adamson v. Gilliland* * * * the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'"

The record in this case discloses that the trial court would have committed error had it found that more than 25 to 40 cases were damaged upon arrival in Los Angeles.

None of the cases of shrimp, including the 25 to 40 soft cases, were examined at Los Angeles to determine whether or not they were unfit for human consumption. All of the 550 cases delivered in Los Angeles by Belyea were in good condition.

Appellant's counsel admitted that

“* * * 500 cases or 450 cases of this same shipment were good and were used in the ordinary course of trade.” [Tr. p. 59.]

Conclusion.

It is respectfully submitted that (1) appellant failed to establish that more than 25 to 40 cases were damaged when the carload of shrimp creole arrived in Los Angeles; and (2) the evidence is such that this court should not hold that the Findings of the trial court are “clearly erroneous.”

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellee and Cross-Appellant.

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC., a corporation,

Appellant.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYEA, doing business as Refrigerated Express Company,

Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

Specification of Errors.

I.

The evidence of cross-appellant proved that it was not negligent in transporting cross-appellee's merchandise. Cross-appellee failed to affirmatively prove any act of negligence against cross-appellant. The trial court therefore erred in granting Judgment for cross-appellee.

II.

The trial court erred in applying the facts of this case, as it found them, to the law in that (a) the trial court did not find that cross-appellant was negligent; (b) Conclusions of Law Nos. 4, 5 and 7 specifically set forth that cross-appellant fulfilled its duty under the bill of lading contract and the tariffs on file with the Interstate Commerce Commission; (c) the Judgment for cross-appellee is therefore in conflict with the Findings of Fact and Conclusions of Law.

ARGUMENT.

I.

The Evidence Introduced at the Trial Disclosed That Cross-Appellant Was Not Negligent and the Burden of Going Forward With the Evidence Then Shifted to Cross-Appellee to Prove Affirmatively That This Cross-Appellant Was Negligent. Cross-Appellee Failed to Prove Any Affirmative Act of Negligence Against This Cross-Appellant and the Court Erred in Not Entering Judgment for Cross-Appellant and Against Cross-Appellee.

A rail carrier is not an insurer of perishable commodities entrusted to its care for transportation. In connection with the transportation of perishable commodities or merchandise which may spoil by virtue of its own inherent vice, a rail carrier has only the duty to exercise reasonable care under the circumstances; that is to remain free from negligence. After the shipper has made out a *prima facie* case of delivery in good condition and receipt in bad condition, the burden of going forward with the evidence shifts to the rail carrier to prove that it has been free from negligence. When the rail carrier has satisfied this require-

ment by producing its records which indicate that it has transported the commodities with due care, then it is incumbent upon the plaintiff to affirmatively prove negligence. Plaintiff's failure to produce such proof requires judgment for the defendant-rail carrier. (*Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 164 F. 2d 1 (C. C. A. 5, 1947).)

Perishable Protective Tariff No. 13, Rule 130, provides:

“Condition of Perishable Goods Not Guaranteed by Carriers.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence.”

Rule No. 135 provides:

“Liability of Carriers.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.” [Deft. Ex. C.]

In the case at bar the rail carrier's evidence proved:
(1) Frozen shrimp creole is a perishable commodity [Tr. pp. 119-120, 93]; (2) the seals attached to the car when

it arrived at Los Angeles were the same as those attached by the shipper at the point of origin. They were unbroken [Tr. pp. 63, 72]; (3) the railroad car (ERDX 2667) was in good condition and was the proper type of railroad car for the transportation of appellant's merchandise [Tr. pp. 62-63, 65, 72]; (4) when the railroad car arrived at Los Angeles the door of the car was in good condition [Tr. p. 72]; (5) the car arrived in Los Angeles on time with no delays [Pltf. Ex. 1, p. 2, par. III; Tr. p. 124]; (6) the consignee was promptly notified of the arrival of the car in Los Angeles [Tr. pp. 69, 139, Deft. Ex. B]; (7) the railroad's icing record proves that the car was regularly iced in conformance with the shipper's instructions and the tariffs on file with the Interstate Commerce Commission ["Exhibit A" attached to Pltf. Ex. 1; Tr. pp. 98, 141]; (8) after the car arrived in Los Angeles the ice in the bunkers was inspected daily; the ice never fell below 75% of bunker capacity [Tr. pp. 122, 128, 98, 141; Deft. Ex. C, Rule 225].

We therefore submit that the case at bar has been brought within the four corners of the doctrine enunciated in the *Atlantic Coast Lines* case, *supra*, page 17.

In that case the shipper brought an action against the carrier for damage to a shipment of beef in transit. The court stated at page 3:

"With respect to the degree of care required of a carrier in the transporting or refrigeration of perishable goods, the shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U. S. C. A. Under §20 of that act, the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading, in accordance with published tariffs and regulations. [Citing cases.] * * *

“It is apparent that these rules limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper.”

The court further states at page 4:

“Under the protective tariffs applicable in this case [Rules 130 and 135 of the Perishable Protective Tariff], the shipper must show that there was a lack of ordinary care on the part of the carrier, but proof *by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service.* Sutton v. Minneapolis & St. L. Ry. Co., 222 Minn. 233, 23 N. W. 2d 561; Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1274.” (Italics supplied.)

In *Sutton v. Minneapolis & St. Louis R. Co.*, 222 Minn. 233, 23 N. W. 2d 561, the shipper brought an action to recover damages for damage to a carload of eggs shipped over defendant's railroad. A judgment for defendant *n.o.v.* was affirmed. At page 562 the court stated:

“The liability of a common carrier to the shipper of perishable products is based upon failure to exercise ordinary care in the preservation of such products while in the course of transportation. [Citing cases.] This rule is elaborated by the one that, if the shipper gives instructions as to the protective measures that shall be taken to preserve such products, compliance with such instructions is complete protection to the carrier against liability for loss. *So. Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1268. No case to the contrary has been called to our attention. The rule is fundamentally just. Rule No. 135 of Perishable Protective Tariff No. 12, on file

with and approved by the interstate commerce commission, is to the same effect. To make out a case against defendant, it must appear that the eggs were delivered to the original carrier in good condition and that their arrival at Minneapolis in bad condition was due to lack of ordinary care on the part of the carrier, *having in mind the rule that compliance with the shipper's instructions as to protective service is a complete defense against a charge of negligence in connection with such service.*" (Italics supplied.)

To the same effect see *Standard Hotel Supply Co. v. Penn. R. R. Co.*, 65 Fed. Supp. 439 (D. C. N. Y., 1945); *Shapiro v. Penn. R. R. Co.* (Court of Appeals for District of Columbia, 1936), 83 F. 2d 581; *Leonard v. Penn. R. R. Co.*, 15 Fed. Supp. 55 (D. C. N. Y., 1936); *South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co.*, 46 F. 2d 452 (C. C. A. 4, 1931); *Southern Pacific Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38.

The law is not as cross-appellee has stated it. The carrier need not affirmatively prove the cause of the damage.

Hall v. Nashville & Chattanooga R. Co., 13 Wall. 367, 20 L. Ed. 594, cited by cross-appellee for the *dictum* that

"* * * when a loss occurs, unless caused by the act of God, or of a public enemy, he [the carrier] is always at fault. * * *"

is not in point. That case was decided prior to the time that the present bill of lading and tariff provisions were approved by the Interstate Commerce Commission. The case merely states the original common law liability of a carrier. Cross-appellee cites *Crinella v. Northwestern Pacific R. Co.*, 85 Cal. App. 440. In that case the icing

record of the railroad was faulty in at least two respects: (1) The car was not iced at all regular icing stations, and (2) the record showed that the car was iced at a station through which it never passed.

At page 8 of its Brief cross-appellee cites *Bronstein v. Baltimore & Ohio R. Co.*, 29 Fed. Supp. 837, for the proposition that:

“The burden of proof is then on the carrier and he must prove that he was free from neglect and that the damage to the goods resulted either from an act of God, public enemy or the inherent nature of the goods themselves.”

In the *Bronstein* case the court stated at page 838:

“The commodity was inherently perishable, and if a method of loading was chosen which caused or contributed to the damage the strict rule of carrier’s liability would not apply.”

And at page 839:

“Thus, the burden in these cases was upon the plaintiff to show carrier’s negligence.”

Such was the burden in the case at bar.

Although it was unnecessary for the rail carrier to affirmatively prove that the damage sustained by cross-appellee was due to “vice of the goods” or “act or default of the shipper,” such evidence was brought out during the trial of the case. Plaintiff’s witnesses testified that it is preferable to place stripping along the sides of a refrigerator car in order to promote the circulation of cold air [Tr. pp. 83-84, 106]. Stripping the car prevents the lading from touching the sides of the car and a column of cold air insulates the lading from the wall of the car upon which

the heat of the sun strikes [Tr. pp. 66, 82-83]. Thus, the damage to 25 to 40 cases may have been the result of cross-appellee's failure to properly strip the car.

Those cases cited by cross-appellee under Point III of its Brief are not relevant. This cross-appellant did not contend below, nor does it now contend, that its liability should be limited to that of a warehouseman.

Cross-appellant has no quarrel with the cases cited on page 23 of Appellant's Brief. The Federal cases are in accord.

Cross-appellee, Hamilton Foods, argues in its Opening Brief under Point II that the rail carriers were negligent in having failed to re-ice the car for 64 hours after it arrived in Los Angeles. The carrier is not only not required to re-ice a car at point of destination when the ice in the bunkers has not fallen below 75% of the bunker's capacity, but a rail carrier would be subject to a charge of discrimination in violation of the Interstate Commerce Act, if it did perform such service.

Rule 225 of the Perishable Protective Tariff No. 13 [Deft. Ex. C] provides in part as follows:

“Cars placed on hold, inspection, or delivery tracks at * * * destination, with bunkers less than three-fourths full of ice, will be re-iced to capacity.”

The shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U. S. C. A., §1 *et seq.* Under that Act the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading in accordance with the published tariffs and regulations. (*Standard Hotel Supply Co. v. Penn. R. R. Co.*, 65 Fed. Supp. 439 (D. C. N. Y.,

1945); *Atlantic Coast Line R. Co. v. Georgia Packing Co. et al.*, 165 F. 2d 169 (C. C. A. 5, 1947).) The published tariffs on file with the Interstate Commerce Commission governs the shipment of goods in interstate commerce, and the carrier must literally adhere to the dictates of the tariff. (*Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868.)

In *Chesapeake & Ohio R. Co. v. H. E. Martin*, 283 U. S. 209, 75 L. Ed. 983, the court stated at page 221 of the Official Court Report:

“And it was distinctly held by this court in *Georgia, F. & A. R. Co. v. Blish Mill. Co.*, *supra* (241 U. S. 197, 60 L. ed. 952, 36 S. Ct. 541), that the parties to a contract of interstate shipment by rail, made pursuant to the Interstate Commerce Act, could not waive its term ‘Nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.’”

Mr. Mulvihill, Assistant Manager of the Santa Fe Refrigeration Department, testified that Los Angeles is *not* a regular icing station on cars destined to Los Angeles when the bunkers are $\frac{3}{4}$ full of ice [Tr. pp. 125, 136].

Under the law and the contract [Rules 130, 135 and 225 of the Perishable Protective Tariff] the rail carrier need only prove that it was free from negligence in transporting the perishable commodities from point of origin to point of destination. Such proof was presented to the

trial court and, as a matter of fact, the trial court found that:

“* * * it would appear that the Railroad Company complied with the protective tariff regulations and with the Bill of Lading under which it was governed in delivery of the shipment to its track in Los Angeles.” [Tr. p. 28, Conclusions of Law No. 7.]

II.

The Conclusions of Law and Judgment Are Not Supported by the Findings of Fact and Are in Conflict Therewith.

The appellate court, reviewing a judgment of the trial court sitting without a jury, has the power to reverse the trial court, if the latter's judgment is not supported by the findings of fact. (*Allen v. St. Louis National Bank*, 120 U. S. 20, 30 L. Ed. 573; *Jensma v. Sunlife Assurance Co. of Canada*, 64 F. 2d 457 (C. C. A. 9, 1933).)

In its opinion and in the Conclusions of Law, the trial court held that the duty imposed upon rail carriers while transporting perishable commodities is to exercise ordinary care under the circumstance [Tr. pp. 15, 27, Conclusion of Law No. 4]. The court found further that:

“* * * the railroad company has complied with the tariff protective regulations and the bill of lading under which it was governed in delivering this shipment on its track here in Los Angeles.” [Tr. pp. 16, 28, Conclusion of Law No. 7.]

Neither in the Findings of Fact nor in the Conclusions of Law does the court state that the railroad was negligent; nor does the court set forth facts from which it can be inferred that the railroad was negligent.

Finding of Fact No. 13 states “that Los Angeles is a regular icing station.” This is true on some traffic, but the undisputed evidence shows that Los Angeles is not a regular icing station in those instances, as here, where it is the point of destination and the ice in the bunker has not fallen below 75% of capacity.

Conclusion of Law No. 5 [Tr. p. 27] is as follows:

“That under the protective tariff applicable to shippers of perishable properties, the plaintiff must show that there was a lack of ordinary care on the part of the carrier as the carrier is not an insurer.”

In its opinion the court stated:

“The only negligence in this case was that 40 cases
* * * arrived in a damaged condition.” [Tr. p.
15.]

This statement of the court indicates that although it held that the railroad is not an insurer of perishable commodities, still in applying the law to the facts of this case, it tacitly assumed that the railroad is an insurer. The Conclusions of Law and Findings of Fact are in conflict with the Judgment. The Conclusions of Law and Findings of Fact support a judgment in favor of the defendant for the following reasons:

The Findings of Fact and Conclusions of Law point out (1) that the railroad is not an insurer, but must merely exercise ordinary care in the transportation of perishable commodities, and (2) that the railroad in this case did exercise that quantum of care which the law requires of it.

An appellate court will not search the record to find evidence to support the trial court's judgment where the trial court has failed to prepare findings of fact which

support its judgment. (*Kelley v. Everglades Drainage District*, 319 U. S. 415, 87 L. Ed. 1485.) A search of the record in this case, however, will disclose that there is no evidence which can support the trial court's Judgment. On the contrary the Findings of Fact are the only tenable findings consistent with the evidence.

Conclusion.

In conclusion we submit:

(1) That the evidence introduced at the trial establishes the fact that the rail carriers were not negligent in handling cross-appellee's merchandise;

(2) That cross-appellee did not affirmatively prove the rail carriers negligent;

(3) That the Findings of Fact and Conclusions of Law reflect the above and are, therefore, inconsistent with the Judgment rendered for cross-appellee.

We therefore request this court to reverse the trial court's Judgment and enter Judgment in this court for cross-appellant or in the alternative to instruct the trial court to enter Judgment for cross-appellant. (*Allen v. St. Louis National Bank*, *supra*; *Massachusetts Bonding & Insurance Co. v. Santee*, 62 F. 2d 724; *Jensma v. Sunlife Assurance Co.*, *supra*; 28 U. S. C. A. 875.)

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellee and Cross-Appellant.

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

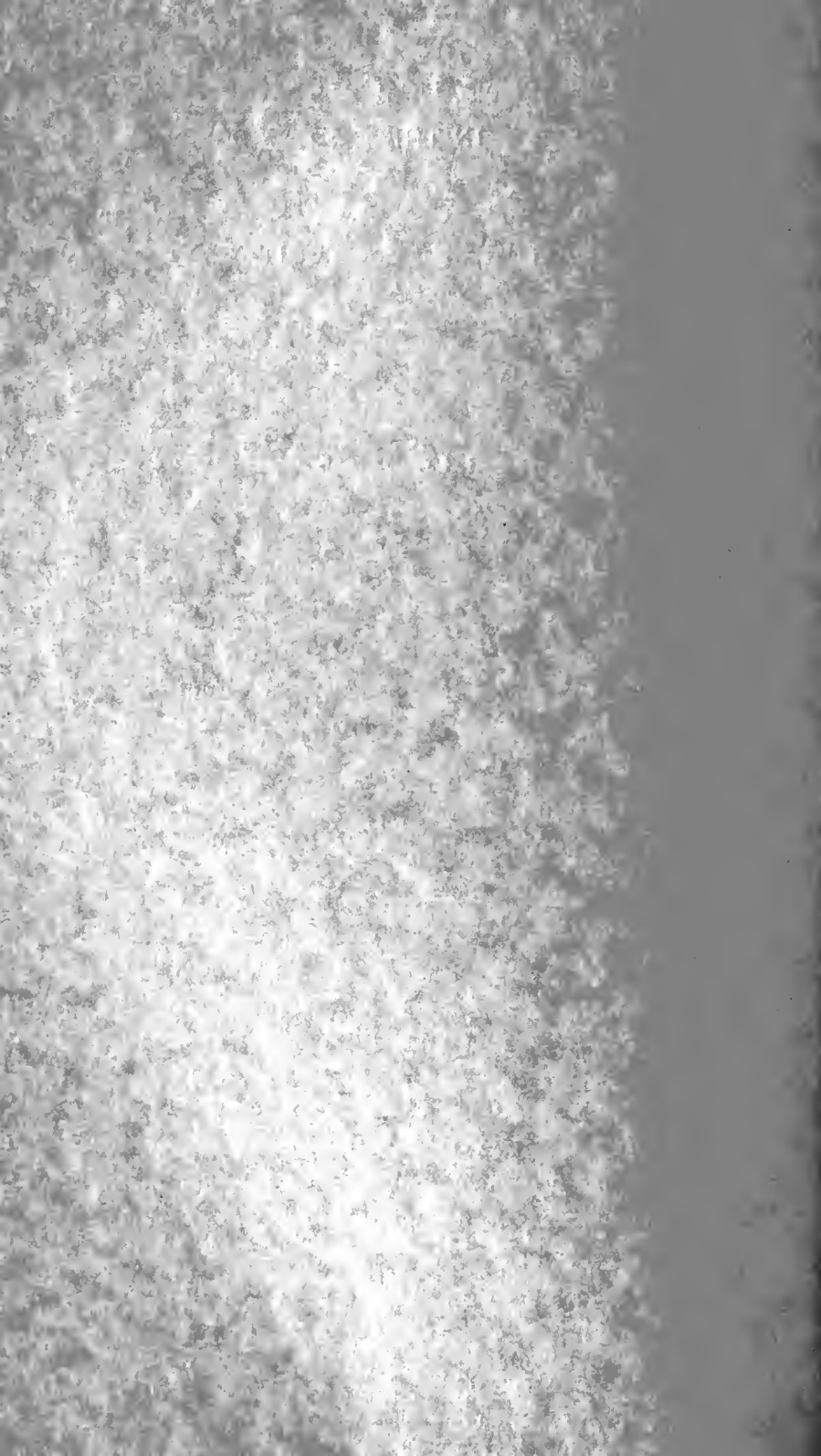
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, Doing Business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Appellees,

APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S REPLY BRIEF.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

9441 Wilshire Boulevard, Beverly Hills,
Attorneys for Appellant and Cross-Appellee.



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No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, Doing Business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Appellees,

APPELLANT'S REPLY BRIEF AND CROSS- APPELLEE'S REPLY BRIEF.

APPELLANT'S REPLY BRIEF.

Statement of Facts.

Appellee contends that appellant in its opening brief has in part misstated facts and for that reason sets forth the facts as it views them. Appellant has accurately stated the facts. Appellee has selected the favorable testimony of its own witnesses and makes this selection the basis of its statement of facts. It disregards all of the contrary testimony upon which the court based its findings of fact.

No useful purpose would be served by going into all of the matters set forth by appellee as to what it believes the

facts are. The record speaks for itself and in this statement of facts appellant merely points out the errors of appellee's contentions and representations.

No notice of the arrival of the car was ever given to appellants' consignee as contended by appellee. Appellee's witness testified that a card had been mailed. Appellant's witness testified that the card had never been received and though they had many previous shipments in only one instance prior to this shipment had they ever received a card. They were usually notified by telephone. [Tr. 107.] Jack Belyea, trucker and agent for the consignee, was *notified by telephone of the arrival of the car on April 11, 1946, and within one-half hour after receiving notice that the car had arrived, Jack Belyea appeared at appellee's track and signed for the car.* [Finding 11, Tr. 21 and 22.] Even appellee's witness, Homan, testified that Belyea came to the car immediately after Homan called him by telephone. [Tr. 139.]

Belyea examined the ice bunkers in the railroad car and found them to be between 50% and 75% full. [Tr. 79 and 98.] Belyea did not request the railroad to further ice the bunkers because he commenced removing the lading from the car soon after it was opened. He testified,

"When Mr. Homan was present and the door of the car was opened, I called his attention to the fact that the merchandise was wet and soft because I wanted to take a blanket exception on the whole car. I didn't want to accept any responsibility so far as I was concerned. The car was in bad order. Mr.

Homan said he wanted to arbitrate as to how many cases were bad. He would allow me to take an exception of some, but he wouldn't allow me a blanket exception on the entire car. Under the circumstances, when time was running out, *it was getting late in the day and no cold storage facilities available, the only alternative left to protect all parties concerned was to get it on the truck immediately and get it transported to its destination.* I know what the condition was in Los Angeles at that time as to cold storage space. It was very critical. I attempted to find cold storage space to move this merchandise into." [Tr. 76, 77.]

Appellee completely ignores any reference to Homan's act of inserting on the receipt signed by Belyea "no exceptions reported" which words were added by Homan *after* Belyea signed the receipt. [Deft. Ex. A; Tr. 140.] The true facts were that Homan himself saw evidence of damage and that Belyea complained of the car being warm and requested a thermometer. [Tr. 144.] Notwithstanding this condition and the complaints of Belyea, the receipt [Deft. Ex. A] was altered by Homan without Belyea's consent.

Appellee misquotes and misstates the testimony when it alleges that Belyea in his opinion contended only 25 to 30 cases were damaged. Belyea testified:

"Q. Had you been able to get the whole carload of shrimp creole frozen in the warehouse, a cold storage warehouse in Los Angeles, is it your opinion that there would not have been any damage to those cartons?

The Witness: Well, that is a hard question to answer. Providing that the cold storage warehouse would have accepted the merchandise.

Q. Well, let us further assume that the cold storage warehouse would have accepted the merchandise. Now can you answer the question?

The Witness: Well, between 25 and 40 cases were in very doubtful condition.

Q. And as to the rest of the car?

The Witness: I believe those could *possibly* have been saved. (Italics ours.) I did in fact make an attempt to get the whole carload, with perhaps the exception of the 25 to 30 cases, into cold storage. It was my thought that if I had been successful in doing so that the cartons *probably* would have been saved—that is the shrimp would *probably* not have been damaged.” [Tr. 81, 82.]

There was no finding that the shrimp was not damaged.

Belyea did not testify how many cases he delivered to San Francisco, Sacramento or Bakersfield. The stipulation covered the number of cartons left in San Francisco and the number of cartons left in Bakersfield. Thirty-five cartons were left in the car. Belyea testified as follows: “The soft merchandise, that was apparently already gone, we left in the car.” [Tr. 75.]

While appellee’s witness, Mulvihill, testified that on April 9, at 3:40 A. M. the bunkers were estimated at 98% full and while on April 10, at 8:00 A. M., the bunkers were estimated 85% full, Mulvihill further testified that

there were no records of any further examination. He testified: "My records do not indicate any further inspection." [Tr. 135.] He also testified: "According to the record, no such inspection was made. My records do not indicate any such inspection." [Tr. 137.] The only other testimony in the entire record is the testimony of Homan who testified that he examined the bunkers and he estimated that they were 75% full on April 11. He testified "When I say I estimated it at 75% *that was my best guess.*" [Tr. 144.] The testimony of Belyea, on the other hand, was that the bunkers were between 50% and 75% full. [Tr. 79 and 98.] There were no markers to indicate the amount or percentage of ice in the bunkers and Homan did not measure the ice in the bunkers. He merely "estimated" that the ice in the bunkers was "about" 75% full, and he did so by looking into a dark bunker *without* any flashlight *from an open light airwell.* [Tr. 144.] The court weighed the evidence of appellant and appellee and came to the conclusion that the bunkers were less than 75% full. It then made its finding, No. 13, that Los Angeles is a regular icing station. The testimony of Mulvihill was that if the bunkers at the time of the delivery of the lading to the consignee are less than 75% full, then and in such event, Los Angeles is an icing station. [Tr. 125.]

The court properly found that Los Angeles was a regular icing station. [Finding 13, Tr. 22.] The court came to this conclusion both from the evidence presented by appellant and from the evidence presented by appellee. The appellee's witness, Mulvihill, testified that "if, on

arrival, the bunkers are less than three-fourths full, 75% full, then they are re-iced here to capacity." [Tr. 125.] The court therefore, based on the testimony of Mulvihill, and coming to the conclusion that the bunkers were less than 75% full, properly found that Los Angeles was a regular icing station.

Appellant and appellee stipulated, "Plaintiff has sustained the following loss: 365 cartons were found to be unfit for human consumption in San Francisco, California. 50 cartons were found to be unfit for human consumption in Bakersfield, California." [Pltf. Ex. 1.]

The stipulation referred to the condition of the shrimp *when it reached San Francisco and Bakersfield* and the court so found. Finding 21, Tr. 25 states:

" . . . and the court finds that the 50 cases which were received in Bakersfield and the 365 cases which were received in San Francisco or a total of 415 cartons were received at Bakersfield and San Francisco in a damaged condition and was contaminated and was not fit for human consumption"

The purpose of the stipulation was to avoid the necessity of the court hearing witnesses on a fact which was known to all parties concerned. The stipulation referred to the condition at the time the merchandise arrived and not to the strained interpretation which appellee now seeks to place upon the stipulation. The court's finding concurred in by appellee is conclusive.

ARGUMENT.

POINT I.

Appellant Proved That the Frozen Shrimp Creole Left Chicago in a Good and Frozen Condition, Arrived in Los Angeles in a Damaged Condition and That the Damage Was the Result of Appellee's Negligence. Appellant Is Entitled to Damages for Its Total Loss.

Appellee, in its reply brief, states that it is unnecessary to discuss the question of appellee's negligence. It sets forth that the only matter raised by the appeal was the question of whether the court awarded sufficient damages. We concur in this statement. The only question raised is the question of damages since the court reached the conclusion that the appellee was negligent. Without the trial court reaching such conclusion, judgment could not have been awarded to appellant.

Appellee, in its reply brief, then finds fault with appellant's statement of facts and then sets forth the facts not as they are and not as found by the court, but as the appellee would *like* to find them.

The heading of Point II of appellee's reply brief states: "The Findings of the Trial Court Will be Upheld Upon Appeal Unless They Are Clearly Erroneous." Under Point I, however, it proceeds to find fault with the Findings of Fact.

Since Appellee in its argument under Point I argues the question of damages, we will discuss that question under our Point I and discuss the question of the Findings of Fact under Point II.

Appellant did establish a *prima facie* case when it proved to the satisfaction of the trial judge that the frozen shrimp creole left Chicago in a good and frozen condition and arrived in Los Angeles in a damaged condition. The evidence was that the car arrived in a warm condition. The testimony was and the Court so found that the car arrived at a temperature of 54 degrees and that no re-icing had taken place from the time the car left San Bernardino on April 8 and the time it was made available to appellant on April 11. [Findings 12, Tr. 22; and Findings 15, Tr. 23.] During this period of time, 64 hours and 25 minutes elapsed without the car being re-iced, at a time when the temperature in Los Angeles was 86 and 88 degrees. When Belyea opened the car, the car was warm, it emitted no cold air, nor was there any vapor escaping from the car, which is usual and customary when a properly cold car is opened on a warm day. [Finding 16, Tr. 23.]

The evidence further was that 25 to 40 cases were completely deteriorated. They were defrosted and soft. This, in conjunction with the fact that the car arrived at a temperature of 54 degrees, was sufficient to establish negligence on the part of appellee and the burden then shifted to appellee to prove that it was free from negligence. (*Bronstein v. Baltimore & Ohio R. Co.*, 29 Fed. Supp. 837.)

Appellee contends that it is not sufficient to show that the merchandise was found to be damaged at Bakersfield and San Francisco. We agree that the conclusiveness of the damage would have been more securely established if the shrimp creole were analyzed in Los Angeles. On the other hand, the Court found that this shrimp creole

was placed in a refrigerated car and moved to Bakersfield and San Francisco. The Court found that there was no negligence on the part of Belyea. Appellee stipulated and the Court also found that the merchandise was contaminated and not fit for human consumption when it arrived in Bakersfield and San Francisco. It found Belyea free of negligence. It found that other lading was moved in the same truck which moved the shrimp creole to Bakersfield and San Francisco; to-wit, frozen broccoli and frozen cauliflower. The Court found that the frozen broccoli and frozen cauliflower arrived in Bakersfield and San Francisco in good condition.

From these findings it is self-evident that nothing transpired between the time the merchandise left Los Angeles and the time the merchandise arrived in Bakersfield and San Francisco which could have caused damage. If there had been no finding that the car arrived in a warm condition; if there had been no finding of a temperature of 54 degrees; if there had been no finding that 25 to 35 cases were defrosted and soft and spoiled; if there had been no finding that Belyea's truck was properly insulated; if there had been no finding that other frozen products in the truck with the shrimp creole reached Bakersfield and San Francisco in a good condition; if there had been no finding that upon arrival in Bakersfield and San Francisco the shrimp creole was spoiled, contaminated and not fit for human consumption, then there might be some basis to appellee's argument, but with the finding that the car arrived warm and with the finding that there was damage to some of the lading, the only conclusion to be reached is that all of the merchandise was in the same condition because it resulted from the same cause. *Noth-*

ing transpired from the time the shrimp creole left Los Angeles and the time it arrived in Bakersfield and San Francisco which could have caused that damage.

The testimony of appellee's witness Homan conclusively proved the negligence of appellee. Homan was present when Belyea opened the car and the evidence was that Belyea immediately demanded of Homan, a thermometer. This demand was made because of the bad condition of the car. Homan testified that in 35 years of checking an average of 35 cars a day, on only four occasions had a demand for a thermometer been made. Homan reluctantly admitted that there was evidence of defrosting and that some of the merchandise was damaged. While he may have testified on direct examination that, "*I saw three or four soft cases in the doorway. I don't know what they call it—kind of wet, moist-like. Three or four were wet or moist,*" the true facts were that 35 cases were so spoiled as to be left in the car to rot. Homan's testimony conclusively showed an attempt on his part to conceal the true facts. Belyea testified that he desired to take an exception to the entire car, but that Homan would not consent. In spite of the condition in which the car was found upon arrival and notwithstanding the facts just related, appellee's agent Homan still had the audacity to insert on a receipt previously signed by Belyea "No exception reported." [Tr. 140.] Homan testified he inserted those words *after* the receipt was signed and without the knowledge or consent of Belyea. Under these circumstances, we can wholly disregard the testimony of Homan. Homan handled an average of 35 cars a day and appellant proved beyond question of a doubt that his memory was either bad or that he was not

telling the truth. Homan testified that he had Belyea sign the receipt after the car was opened. This does not bear close scrutiny nor is it logical. Belyea testified that he signed the receipt *first* and it is only natural to assume that the appellee would not deliver possession of the car and the merchandise contained therein *without a receipt first being signed*.

It would therefore be the natural deduction and conclusion from all of the facts and from the findings as signed by the Court that the car arrived in Los Angeles in a bad condition with merchandise spoiled. The burden then shifted to the appellee to prove that it was free from negligence and this the appellee failed to do.

Appellee argues in its brief that there may be a difference in the freezing point of shrimp and that of broccoli and cauliflower. It sets forth that appellant should have proved that the freezing point of broccoli and cauliflower was the same as shrimp. It also contends that appellant should have taken the temperature of the lading and not the temperature of the car. Belyea testified he was only concerned with the condition of the car as he found it.

The testimony of Belyea was to the effect that the truck carried *frozen* broccoli and *frozen* cauliflower; that if the temperature of the lading was 25 degrees or more, the refrigerated equipment in the truck would pull the temperature down 15 degrees. It would, therefore, be apparent that if the lading were less than 25 degrees, it would not have been damaged, as expert witness Spoelstra testified that the shrimp starts to defrost and deteriorate only *after* it reaches 25 degrees. At the time the lading was put in the truck, it had already started to deteriorate because nothing intervened between the time the lading

was removed and the time it reached Bakersfield and San Francisco.

Appellee also argues that it was appellant's duty to prove Belyea negligent. *Does it infer that it was appellant's duty to find Belyea negligent even if the facts showed that Belyea was not negligent?* The facts were that nothing which Belyea did could point toward negligence and, therefore, the only negligence apparent from the record was that of the appellee.

Appellee quotes from the case of *Julius Klugman's & Sons v. Oceanic Steam Navigation Co.*, 422 F. 2d 461 (D. C. N. Y., 1930), and attempts to show an analogy between the facts of that case and the facts in the instant case. Scrutiny of the quotation itself will show that that case was properly determined. There the furs were left in a warehouse and the Court came to the conclusion that something may have occurred between the time the furs were originally unloaded and the time the loss was discovered.

The case before the Court is distinguishable, however, because from the facts, it is evident that *nothing* could have occurred from the time the shrimp was unloaded until it was received in Bakersfield and San Francisco. If, in the case cited by appellee, the furs were under the personal scrutiny of a watchman from the moment they were unloaded to the time when the loss was discovered, the Court would have reached a different conclusion.

Again, in the case of *McCready, et al. v. Holmes*, 15 Fed. Cas. No. 8,733 at page 1347, the Court again refers to the control of the merchandise in the hands of various agents. The inference is that something may have hap-

pened while in the hands of the other agents. In the instant case, the evidence was conclusive that nothing transpired while in the hands of Belyea. On the contrary, Belyea's truck reduced the temperature of the shrimp. *Belyea was an independent carrier and defendant, who was found not guilty of negligence; he was not appellant's agent.* [Tr. 26.]

Likewise, in the *McCready* case, the Court refers to the failure on the part of the consignee to examine the merchandise. In the case before the Court, Belyea did examine the goods and Belyea did remonstrate that the car was warm and Belyea did demand a thermometer. Belyea testified he wanted to take an exception to the whole car but that Homan refused to permit it and instead of arguing about it, he attempted to salvage what he could.

Appellee then quotes from the *McCready* case, *supra*, that the coal was carted some distance and then weighed, and that the carts were under the control of the consignee. It is true that the loss could have happened while under the care of the agents of the consignee. But again we must distinguish that case from the one before the Court because here the evidence conclusively showed that *nothing* transpired which could have caused the loss. In the case before the Court, appellee stipulated that the shrimp creole arrived in Bakersfield and San Francisco in a damaged condition and the Court so found. When we consider that the broccoli and cauliflower arrived in good condition, but the shrimp in bad condition, we can only come to the conclusion that nothing transpired while the merchandise was in the hands of Belyea because the Court found Belyea was not guilty of negligence.

POINT II.

The Amount Allowed to Appellant for Damages Is Inadequate, Unreasonable and Arbitrary and Is Contrary to the Weight of the Evidence and the Findings of Fact.

Appellee, in its argument under Point II contends that the findings of the trial court should be upheld unless they are "clearly erroneous." We concur with that statement. We contend that the Findings of Fact adequately established the loss of appellant, but that the Court granted judgment for an improper amount.

It should be pointed out that the appellees concurred in the Findings of Fact with which they found fault in Point I of their brief. Rule 7 of the Rules of Civil Procedure of the District Court of the United States for the Southern District of California, provides,

"No document governed by this rule (referring among other things to Findings of Fact), shall be signed by the Judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the Judge, within five (5) days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor."

The rule further provides for the filing of objections, the hearing and argument thereon and the modifications of proposed Findings of Fact and Conclusions of Law. In the instant case Findings of Fact were submitted to the appellee for approval. Appellee requested certain changes in these Findings of Fact which changes were made by appellant, and *before* the Findings of Fact were submitted to the trial judge they were approved by the appellee.

Appellee cannot therefore at this late date find fault with the Findings of Fact or to argue that they are not correct. While appellee in Point II of its reply brief contends "the Findings of the trial court will be upheld upon appeal unless they are 'clearly erroneous'" in Point II of its cross-appeal, it contends that the Findings of Fact are not correct and are, in fact, improper. In other words, in reply to appellant's brief, it argues that the Findings of Fact are correct but in its opening brief on its cross-appeal, it contends that the Findings of Fact are incorrect. Appellee takes this inconsistent stand notwithstanding the fact that appellee *approved* the Findings of Fact.

It is difficult to treat both matters separately and we wish therefore at this point to set forth some of the inconsistencies of appellee in its argument. Appellee contends that the court erred in its Finding 13 which reads: "Los Angeles is a regular icing station." [Tr. 22.] The court could reach this conclusion by several means. Appellee's own witness, Mulvihill, who is assistant manager of appellee's refrigerated department and who has been in appellee's employ for over 20 years, testified that Los Angeles was a regular icing station. In answer to a question by appellee as to whether Los Angeles was a regular icing station, he testified "On some traffic. Not on destination. If the bunkers are three-fourths full on arrival." [Tr. 125.] He further testified "San Bernardino is a regular icing station. If a car has been iced in San Bernardino ice is added in Los Angeles if, on arrival, the bunkers are less than three-fourths full, 75% full then they are re-iced here to capacity * * *." [Tr. 125.]

This testimony taken together with the testimony of Belyea that he found the bunkers *between* 50% and 75%

full is sufficient to establish Los Angeles as a regular icing station even under appellee's view of the facts.

Appellee's witness, Homan, did not testify that the bunkers were 75% full. He testified that the bunkers were "*approximately 75% full.*" He stated that he merely *estimated* the amount of ice in the bunkers. How Homan could come to the determination that the bunkers were more than 75% full or how appellee could come to the conclusion that no re-icing was necessary, we can not possibly conceive. Mr. Homan testified:

"I examined the bunkers by opening them up. I climbed up on top. I did not have a flashlight with me. I just looked down into it. There was no light in the bunkers—there was ice down there and I just looked down in there. I just glanced down and *estimated as to what the car had. There are no markers in there to indicate how much ice is in the bunkers. When I say I estimated it at 75%, that was my best guess * * *.*"

It is apparent from this testimony of Homan that his estimate of 75% was merely a "guess" and that he made no accurate determination. How would Homan even estimate it at 75% by looking down into a dark hole from a lighted area without a flashlight and without any indication of the height of the bunkers or any markings in the bunker? From these facts and coupled by the testimony of Belyea that the bunkers were *between* 50% and 75% full, was the Court not justified in coming to the conclusion that the bunkers were *less* than 75% full and that therefore Los Angeles was a regular icing station? Is not therefore Finding of Fact 13 "That Los Angeles is a regular icing station" accurate?

If Los Angeles is a regular icing station and appellee in approving the Findings of Fact concurred that it was, and the Court so found, *then appellee was negligent when it failed to re-ice in Los Angeles.* Appellee merely glosses over this very substantial evidence. Appellee, at page 22 of its brief, quotes Rule 225 of the Perishable Protective Traffic No. 13, Defendant's Exhibit "C". *Appellee admits that the bunkers had to be re-iced if the car arrived at its destination with the bunkers less than three-fourths full of ice.* In view of the foregoing facts, in view of the testimony of Mulvihill and Homan, both witnesses of appellee, and the testimony of Belyea, the Court could come to only one determination and that is that the bunkers were less than three-fourths full and that therefore re-icing in Los Angeles was required by appellee. *Its failure to re-ice was negligence.*

The icing instructions required the appellees "to insure icing to capacity, 13000 pounds crushed ice and 3900 pounds salt, re-iced to capacity, crushed ice, 30% salt at all regular icing stations, and oftener if delayed," this required the appellee to re-ice in Los Angeles, which the Court found was a regular icing station. The failure of the appellee to re-ice established the negligence beyond a question of doubt. It is this negligence which caused the damages suffered by appellant. Had the appellee re-iced, no damage would have ensued. It was like a cow which gives a full bucket of milk and then kicks it over. Appellee apparently performed its duty nearly to the very end, but when it reached the point at which it required the

greatest amount of care, namely, when the car was shunted about from San Bernardino to Los Angeles in a temperature of 88 degrees, there appellee left the car uniced and unattended.

It is interesting to note that while only six (6) days elapsed between the time the car left Chicago and the time it arrived in San Bernardino, 2400 miles away, it took this same car three days to travel from San Bernardino to Los Angeles, only 60 miles away. The icing instructions provided that the car was to be iced "oftener if delayed." [Finding 6, Tr. 20.] Apparently appellee did not consider this a delay. The facts were that the car was delayed, that the car was shuttled about for three days before it was placed on a siding accessible to appellant. [Tr. 69.]

Even assuming Los Angeles was not a regular icing station, this was a delay which required appellee to re-ice. Its failure to re-ice caused the damage suffered by appellant. It is difficult to comprehend why appellee iced its car on an average of every 18 hours and 50 minutes en route from Chicago to San Bernardino when the various temperatures through which the car passed averaged approximately 50 degrees mean temperature, and why it failed to ice the car for 64 hours and 25 minutes, when the temperature in Los Angeles reached 88 degrees.

We respectfully submit that this was negligence on the part of the appellee and the Court so found when it awarded damages to appellant for the soft and spoiled cartons which were visibly soft and spoiled. The error of

the Court was in the failure of the Court to award appellant all of its damages. We submit appellant proved beyond a reasonable doubt that the shrimp was damaged when it arrived in Los Angeles. True, the damage may not have been visible, but the damage nevertheless existed. The fact that it was ascertained within a relatively few hours after consignee moved the merchandise should not alter the liability of appellee for failing to properly ice and for failing to deliver the merchandise in a frozen condition.

After appellant established a *prima facie* case, the burden shifted to appellee to prove that it was free from negligence and this the appellee failed to do. We respectfully submit that judgment should be awarded appellant for the full amount of its damage, to wit, the sum of \$4,455.00, plus its loss of freight in the sum of \$269.75, or a total of \$4,724.75, together with interest from April 2, 1946, and its costs of suit.

CROSS-APPELLEE'S REPLY BRIEF.

I.

The evidence of cross-appellee conclusively proved that cross-appellant was negligent in transporting cross-appellee's merchandise from Chicago to Los Angeles. All of the arguments set forth in appellant's opening brief and appellant's reply brief are pertinent to the cross-appeal and we adopt the same as a part of the cross-appellee's brief on the cross-appeal. Cross-appellee proved beyond any question of doubt the negligence of cross-appellant and the trial court properly granted judgment for the cross-appellee, excepting that the judgment granted was not sufficient and did not cover the total loss of cross-appellee.

II.

The trial court did not err in applying the facts of the case as it found them to the law but failed to grant cross-appellee the proper amount of damages. The trial court found that Los Angeles was a regular icing station. [Finding of Fact 13, Tr. 22.] The cross-appellant did not re-ice in accordance with the shipper's instruction. This failure to re-ice was the cause of the damage sustained by cross-appellee. The judgment for cross-appellee is in conformance with the findings but the Court erred in not awarding cross-appellee all of the damage sustained by it as a result of cross-appellant's negligence.

ARGUMENT.

POINT I.

The Evidence Introduced at the Trial Disclosed That Cross-Appellant Was Negligent and the Burden of Going Forward With the Evidence Shifted From Cross-Appellee to Cross-Appellant to Prove That Cross-Appellant Was Free From Neglect and That the Damage to the Goods Resulted Either From an Act of God, Public Enemy or the Inherent Nature of the Goods Themselves.

We concede that a rail carrier is not an insurer of perishable commodities entrusted to its care for transportation. We also concede that perishable commodities may spoil by virtue of its own inherent vice. The rail carrier however owes the duty to exercise the care warranted under the circumstances. It must remain free from negligence.

Cross-appellee made out a *prima facie* case of delivery to the carrier in good condition and receipt in bad condition when it established that the car arrived at a temperature of 54 degrees and the visible merchandise spoiled. The burden then shifted to the railroad carrier to prove that it was free from negligence. The rail carrier did not satisfy this requirement and therefore the Court ordered judgment in favor of appellant and cross-appellee. The evidence was that Los Angeles was a regular icing station and under the Protective Tariff as cited by cross-appellant and under the testimony of Mulvihill, cross-appellant owed the duty to re-ice. It is undisputed that there was no re-icing in Los Angeles.

We concede that shrimp creole is a perishable commodity and that the seals on the car were intact until removed by Belyea in the presence of Homan. While cross-appellant

contended that the car arrived on time it cannot dispute the fact that it took this car only six days (from April 2 to April 8) to move from Chicago to San Bernardino, a distance of 2400 miles, whereas it took the same car three days (from April 8 to April 11) to move from San Bernardino to Los Angeles, a distance of 60 miles. While the average temperature en route from Chicago to San Bernardino was approximately 50 degrees, the average temperature from San Bernardino to Los Angeles was approximately 86 degrees.

Cross-appellant contends that consignee was promptly notified of the arrival of the car in Los Angeles. The facts were and the evidence is that Belyea was looking for the car and called Homan daily for a period of four or five days to try to locate the car and was advised by Homan that they had had some trouble in spotting the car and Homan called Belyea when the car was finally spotted on April 11. [Tr. 69 & 70.] Cross-appellant's witness, Mulvihill, testified that there were tracks where the car was spotted on which the car could be placed and which would make it inaccessible to cross-appellee. [Tr. 129.]

The car was not regularly iced in conformance with shipper's instructions. The facts are that the car was improperly iced in that Los Angeles was a regular icing station [Finding 13, p. 22] and the cross-appellant failed to re-ice in Los Angeles in accordance with the icing instructions. This was negligence on the part of cross-appellant. It was cross-appellant's failure to comply with the icing instructions which caused the damage. Cross-appellant left the car standing in a broiling sun for a period of almost three days with a temperature of 86 to 88 degrees without re-icing. This was a breach of its contract and a violation of its duty under the Protective Tariffs referred to by cross-appellant in its brief.

Cross-appellant, at page 19 of its brief, refers to Rules 130 and 135 of the Perishable Protective Tariff and alleges that the shipper must show that there was a lack of ordinary care on the part of the carrier. It sets forth further that proof by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service and quotes the cases of *Sutton v. Minneapolis & St. L. Ry. Co.*, 222 Minn. 233, 23 N. W. 2d 561; *Southern Pacific Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1274, and *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 164 F. 2d (C. C. A. 5, 1947).

Cross-appellee did prove failure of the carrier to comply with the shipper's instructions. The instructions were to re-ice at all regular icing stations. The Court found Los Angeles to be a regular icing station. [Finding 13, Tr. 22.] Cross-appellant admits it did not re-ice in Los Angeles. By failing to re-ice, cross-appellant breached the shipper's instructions and failed to comply with them. This was negligence.

Cross-appellant finds fault with cross-appellee's citation of *Hall v. Nashville & Chattanooga R. Co.*, 13 Wall. 367, 20 L. Ed. 594, and *Crinella v. Northwestern Pacific R. Co.*, 85 Cal. App. 440, 259 Pac. 774. In the latter case cross-appellant states that the railroad was at fault because the car was not iced at regular icing stations. Are not those facts applicable here? In the case before the Court the railroad failed to ice at a regular icing station. Since it is admitted that Los Angeles is a regular icing station [Finding 13, Tr. 22] and since it is admitted that no ice was added to the car in Los Angeles, the facts in the case before the Court are identical with those in the case of *Crinella v. Northwestern Pacific R. Co.*, *supra*, cited by cross-appellant.

Cross-appellant then refers to the loading of the goods. The testimony of the witness, Hale C. Burrus, of the Fulton Cold Storage Market to the effect that the merchandise was properly loaded is without dispute. [Tr. 64, 65 & 66.]

There was no evidence that the damage sustained by cross-appellee was due to "the vice of the goods" or "act or default of the shipper." Cross-appellant mis-states the evidence when he states "plaintiffs' witness testified that it is preferable to place stripping along the sides of a refrigerator car in order to promote the circulation of cold air. (Cross-appellant's Brief, p. 21.) The witness, whose testimony cross-appellant quotes, is that of the defendant, Belyea. Belyea was not cross-appellee's witness. Belyea was a defendant in the action and was examined pursuant to Rule 43 of the Federal Rules of Civil Procedure as an adverse witness and we submit to the Court that it is unfair and improper for cross-appellant to make such statements in its brief when it is fully aware of the true facts. It is misleading to so present the matter.

Cross-appellant refers to stripping the car. This evidence and all matters in connection therewith was a red herring presented solely for the purpose of avoiding the real issues in the case. Apparently the Court did not consider it of much importance because there was ample and sufficient evidence in the record that stripping was unnecessary. Burrus testified that he was superintendent of the Fulton Market Cold Storage Company in Chicago and that he had been with that company for 24 years and he testified that in his experience of over 18 to 24 years the type of car used by cross-appellee and the method of loading the merchandise was the common practice in loading refrigerated cars. He testified that this method had been used thousands of times without any loss and that from

his experience less than 5% of all of the refrigerated cars ever have any stripping on them. [Tr. 61-63, 64.]

Furthermore, the evidence was that the lading in the car was only 3 feet high, whereas the height of the car itself was 8 feet. The evidence further shows that there was an air space below the lading of several inches and it is unquestionable that there was ample ventilation in the car. [Tr. 105, 106.] Belyea testified:

“The packages being 8 to 10 inches high and this merchandise being stacked 3 boxes or 4 tiers high on the outside; I would estimate that it was 3 to 3½ feet in height. The rest of the car was empty. I believe that the car is 8 feet high inside. Five of the eight feet was ventilation space. The purpose of stripping a car is when a car is filled it can get some circulation through the car, that is, where it is solidly packed, but they put these strips along the wall to permit air to get around the packages.” [Tr. 105, 106.]

Cross-appellant then refers to the testimony of Mulvihill and represents that Mulvihill testified that Los Angeles is not a regular icing station on cars destined to Los Angeles when the bunkers are three-fourths full of ice. (Cross-Appellant's Brief, p. 23.) The evidence was, as we have heretofore referred to in the appellant's brief and reply brief, that the bunkers were *less* than three-fourths full of ice and this was testified to by Belyea, as well as Homan. Homan did not testify that the bunkers were 75% full. He “*estimated*” it was 75% full. *That was his best guess.* [Tr. 144.] From this evidence, the Court reached the finding that Los Angeles was a regular icing station and cross-appellant approved that finding. The failure to re-ice was therefore negligence on the part of cross-appellant.

POINT II.

The Findings of Fact Support Conclusions of Law and Judgment in Favor of Cross-Appellee, but the Court Erred in Not Granting Cross-Appellee the Full Amount of Damages as Prayed for in Its Complaint.

The Findings of Fact lead to but one conclusion, namely, that the cross-appellant breached its contract of carriage in negligently transporting the merchandise and in failing to properly ice and salt the lading in accordance with instructions and in accordance with the protective tariff applicable to perishable properties.

The Findings of Fact show a delivery of the merchandise in good condition to the carrier with adequate instructions for its protection, and the arrival of the lading in Los Angeles with some of the lading obviously and visibly damaged and unfit for human consumption, and a portion in any event in a questionable condition. The 415 cartons which were in a questionable condition were then transported by the defendant Belyea to other points where they arrived in a damaged condition. Complaint was made against both carriers and after all the evidence was considered the Court found that defendant Belyea was not guilty of any negligence. [Finding 24, Tr. 17 to 26.]

Based on the foregoing specific Findings of Fact, the Court made certain Conclusions of Law. The cross-appellee has particularly referred to Conclusions of Law No. 4 and No. 7. [Tr. 27 and 28.]

A reading of Conclusion of Law No. 4 will indicate that it is merely a statement of the general rule of law, to wit: That under the applicable Perishable Protective Tariff, if goods arrive at the place of delivery in damaged

condition caused by lack of ordinary care on the part of the carrier, the carrier is liable. Further, that compliance with the conditions of the Perishable Protective Tariff is a defense against any charge of negligence and that the measure of the duty of the carrier is to use reasonable ordinary diligence.

It should be noted that Conclusion No. 4 does not state cross-appellant complied with the conditions of the Perishable Protective Tariff. This Conclusion is a mere recital of the general rule of law and goes no farther.

Similarly Conclusion of Law No. 7, which is quoted in part by cross-appellant on page 24, is not a conclusion that the cross-appellant complied with the Tariff Regulations, nor is it a conclusion that the cross-appellant was free from negligence. A reading of the entire paragraph rather than the portion quoted by cross-appellant will so indicate.

Cross-appellant is attempting to show from certain *general statements* in the Findings and in the Conclusions of Law that the Court found the cross-appellant free from negligence and that it had complied with the Protective Tariff Regulations and with the terms of its Bill of Lading. No such conclusion can reasonably be reached from the general statements in the Conclusions of Law referred to by cross-appellant.

It is a general rule that special findings will control a general finding in the event of inconsistency. 64 *Corpus Juris* 1261, Sec. 1109. *In re Reid's Estate*, 79 Cal. App. 2d 34, 179 P. 2d 353, wherein the Court quoted from

Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal. 2d 103, 118, 53 P. 2d 929, 936, in part as follows:

“ . . . It is also well settled, however, that when a general finding conflicts with a special finding the latter controls. . . . ”

To the same effect see *Lobb v. Brown*, 208 Cal. 476, 281 Pac. 110.

Cross-appellant refers to Finding of Fact No. 13 on page 25 of its brief. This Finding is a very simple one, to the effect that Los Angeles is a regular icing station. Cross-appellant attempts to relieve itself completely from the effect of this simple finding by coming to an erroneous conclusion based upon an incorrect assumption. Referring the Court to the cross-appellant's brief, page 25, it will be noted that it is therein stated by cross-appellant that it is true that on some traffic, where the ice in the bunkers has fallen below 75% of capacity, that Los Angeles is a regular icing station on destination traffic. Cross-appellant then starts with the erroneous assumption that the ice in the bunkers was not below 75% capacity and, therefore, Finding of Fact No. 13 is erroneous. Viewing the evidence most favorably to cross-appellant, which the appellate court is certainly not required to do, the most that can be said is that there is a conflict in the testimony as to whether the ice in the bunkers was below or above 75% capacity. This conflict was determined in favor of the cross-appellee by the trial court and will not be disturbed on appeal. Thus, cross-appellant's argument falls completely because we must start with the assump-

tion that the ice in the bunkers upon arrival in Los Angeles was less than 75% of capacity.

The trial court held that cross-appellant was negligent when it specifically held by its Finding No. 13 that Los Angeles is a regular icing station because before the trial court could do that, it had to hold that the ice in the bunkers had fallen below 75% of capacity. That being so, the cross-appellant had not complied with the Protective Tariff applicable, had breached the terms of the Bill of Lading and had not complied with the icing instructions of the cross-appellee.

Conclusion.

It is respectfully submitted as follows:

(1) That the evidence introduced at the trial established that the rail carrier was negligent in its carriage of the lading.

The lading was delivered to the carrier in Chicago in good condition and arrived in Los Angeles in a damaged condition. The carrier failed to establish that it complied with the icing instructions or the applicable protective tariff. On the contrary, the evidence particularly proved and the trial court found that the carrier did not comply with the icing instructions and the protective tariff.

(2) The cross-appellee did more than satisfy the burden of proof by affirmatively proving the particulars wherein the rail carrier was negligent.

(3) The Findings of Fact and Conclusions of Law set forth that cross-appellant breached its contract of carriage

in failing to protect the lading as required by the applicable protective tariff and the shipper's instructions and that the carrier was negligent.

(4) In fixing the amount of damages, the trial court was in error in failing to give judgment for cross-appellee for the full amount of its loss in the sum of \$4724.75 and in limiting the amount of cross-appellee's damage to only that portion of the lading which was *visibly* damaged.

We therefore request this Court to reverse the trial court's judgment and enter judgment in this Court for cross-appellee for the sum of \$4724.75, or in the alternative, to instruct the trial court to enter judgment in said amount for cross-appellee.

Respectfully submitted,

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By ALBERT H. ALLEN,

Attorneys for Appellant and Cross-Appellee.

No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,
Appellant,

vs.

H. F. METCALF, Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., Bankrupt, DOR-
OTHY DAY, MARTHA McMILLEN, MATILDA
OLSEN, WILLIAM H. NEBLETT, MRS. F. P.
NEWPORT, EUGENE P. CLARK, E. P. NEW-
PORT CORPORATION, LTD., RUBY E. NEB-
LETT, SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES and JOSEPH SATTLER,
Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 208, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

AUG 28 1948

PAUL P. O'BRIEN,



No. 11962

IN THE

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FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

O'MELVENY & MYERS
PIERCE WORKS
RICHARD C. BERGEN
HOWARD J. DEARDS
433 South Spring Street
Los Angeles 13, Calif.

For Appellees Dorothy Day et al.:

LAWRENCE M. CAHILL
606 South Hill Street
Los Angeles 14, Calif.

and

EDMUND NELSON
617 South Olive Street
Los Angeles 14, Calif.

For Appellee H. F. Metcalf, etc.:

BAILIE, TURNER & LAKE
ALLEN T. LYNCH
811 Citizens National Bank Building
Los Angeles 13, Calif.

For Appellee Security-First National Bank of Los Angeles:

PAUL E. IVERSON
911 Pacific Southwest Building
215 West Sixth Street
Los Angeles 14, Calif.

For Appellee Joseph Sattler:

JOSEPH SATTLER in Pro Per
458 South Spring Street
Los Angeles 14, Calif. [1*]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 25308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD.,

Alleged Bankrupt

CREDITORS' INVOLUNTARY PETITION IN
BANKRUPTCY

To the Honorable, the Judges of the Central Division
of the United States District Court for the Southern
District of California:

The petition of C. G. Kinsey, W. B. Halligan, and
Hiram E. Casey, as Trustee of the Estate of Charles R.
Stuart, a Bankrupt, respectfully shows and alleges:

I.

That at and during all the times herein mentioned the
F. P. Newport Corporation, Ltd. was and is a corpora-
tion, and has had its principal place of business at 106
West 6th Street in the City of Los Angeles, County of
Los Angeles, State of California for the greater portion
of the six months next preceding the filing of this peti-
tion, and owes debts in the amount of One Thousand
(\$1,000.00) Dollars and over, and the same is a com-

[HEC] doing a realty business

mercial corporation, and is not a municipal, railroad,
insurance or banking corporation or a building and loan
association.

II.

That your petitioners are creditors of the said F. P.
Newport Corporation, Ltd. having provable claims

mounting in the aggregate in excess of securities held by them to the sum of Five Hundred (\$500.00) Dollars and more. That the nature and amounts of your petitioners' claims are as follows, to-wit: [2]

(a) The claim of your petitioner C. G. Kinsey is a balance due for work and labor performed and services rendered to the said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$2,500.15 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof is now due, owing and unpaid from the said Alleged Bankrupt to the said C. G. Kinsey;

(b) The claim of your petitioner W. B. Halligan is a balance due for work and labor performed and services rendered to the said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$613.32 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof is now due, owing and unpaid from the said Alleged Bankrupt to the said W. B. Halligan;

(c) The claim of your petitioner Hiram E. Casey as Trustee in Bankruptcy for Charles R. Stuart, Bankrupt, is based upon a judgment procured by the said Hiram E. Casey as Trustee of the said Charles R. Stuart, Bankrupt, in the sum of \$766.97, which said sum was procured in the Municipal Court in the City of Los Angeles, County of Los Angeles, State of California, on the 12th day of June, 1934, in an action therein numbered 346125 wherein your said petitioner was the plaintiff and the said Alleged

Bankrupt herein was the defendant; that no part of the said sum has been paid, and the whole thereof remains due, owing and unpaid.

III.

That the said Alleged Bankrupt, F. P. Newport Corporation, Ltd. is insolvent, and that within four months next preceding [3] the date of this petition and while insolvent the said F. P. Newport Corporation, Ltd. committed an act of Bankruptcy in this, that it did heretofore on or about the 15th day of March, 1935, transfer a portion of its property, to-wit, money in the sum of \$433.20 to a certain general unsecured creditor, to-wit, J. B. Gribble, with intent to prefer the said creditor over its other creditors in the same class, the payment of which said sum, as aforesaid, did then and there amount to a preference in favor of the said creditor.

Wherefore, your petitioner prays that service of this petition with the subpoena be made upon the said F. P. Newport Corporation, Ltd. as provided by the Acts of Congress relating to Bankruptcy, and that it may be adjudged by the Court to be a Bankrupt within the purview of the said Act.

C. G. KINSEY

W. B. HALLIGAN

HIRAM E. CASEY

Hiram E. Casey as Trustee of the Estate of
Charles R. Stuart, Bankrupt

HIRAM E. CASEY

Attorney for Petitioning Creditors. [4]

[Verified.]

[Endorsed]: Filed March 19, 1935. R. S. Zimmerman,
Clerk. [5]

[Title of District Court and Cause]

ADJUDICATION OF BANKRUPT AND ORDER
OF REFERENCE

At Los Angeles, in said District, on the 12th day of January, A. D. 1937, before the Honorable Wm. P. James, Judge of said Court in Bankruptcy, the petition of C. G. Kinsey, W. B. Halligan and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a Bankrupt, that F. P. Newport Corporation, Ltd., a corporation be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said F. P. Newport Corporation, Ltd., a corporation, is hereby declared and adjudged a bankrupt accordingly.

It Is Therefore Ordered, That said matter be referred to E. R. Utley, Esq., one of the Referees in Bankruptcy of this Court, to make such further proceedings therein as are required by said Acts; and that the said F. P. Newport Corporation, Ltd. shall attend before said Referee on the 19th day of January, at Los Angeles, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said involuntary bankruptcy.

Witness the Honorable Wm. P. James, Judge of the said Court, and the seal thereof, at Los Angeles, in said District, on the 12th day of January, A. D. 1937.

[Seal of the Court]

R. S. ZIMMERMAN

Clerk

By M. R. Winchell

Deputy Clerk

[Endorsed]: Filed Jan. 12, 1937. R. S. Zimmerman,
Clerk. [6]

[Minutes: Wednesday, February 28, 1945]

Present: The Honorable Paul J. McCormick, District Judge.

It is ordered that the following orders re-assigning cases heretofore pending before Ernest R. Utley, Esq., Referee in Bankruptcy, now resigned, be filed and spread upon the minutes, to wit:

* * * * *

In the District Court of the United States, Southern District of California, Central Division.

It appearing that Ernest R. Utley, Esq., has resigned as Referee in Bankruptcy in and for the County of Los Angeles, State of California,

It Is Ordered that the following cases heretofore pending before Ernest R. Utley, Esq., be and they hereby are transferred and re-referred to Hugh L. Dickson, Esq., duly qualified Referee in Bankruptcy in and for the County of Los Angeles, State of California for further proceedings pursuant to the Bankruptcy Act:

* * * * *

25308-M F. P. Newport Corporation

43277-H Diogenes P. Volkman

* * * * *

PAUL J. McCORMICK

Judge, U. S. District Court

February 28th, 1945.

Filed Feb. 28, 1945 at Min. past 5 o'clock P. M.
Edmund L. Smith, Clerk; by F. Betz, Deputy. [7]

[Title of District Court and Cause]

PETITION FOR AUTHORITY TO SELL AND FOR
CONFIRMATION OF SALE OF REAL PROP-
ERTY TO THE PROCTOR & GAMBLE MANU-
FACTURING CO., A CORPORATION

H. F. Metcalf, petitioner, respectfully represents unto the Court:

1. That petitioner is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

2. That among the properties which have come into possession of petitioner as such Trustee is a portion of Rancho Los Cerritos situate in the City of Long Beach, County of Los Angeles, State of California, more particularly described as follows:

Beginning at the most Southeasterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577, Page 105 of Deeds, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeast-erly line of the land described in said deed, North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 500 feet to [8] the point of beginning.

3. That legal title to said real property stands of record in the name of Security-First National Bank of Los Angeles as security for an obligation owing to said Bank by the bankrupt corporation as will more particularly appear by reference to an agreement dated January 12, 1937, made and entered into by and between said Trus-

tee in Bankruptcy, said Security-First National Bank of Los Angeles, the said bankrupt corporation and others, the supplement thereto and modifications thereof. Copies of said documents are on file with this Court, reference to which is hereby made for further particulars.

4. That on or about October 15, 1947, petitioner received an offer for the said property from The Procter & Gamble Manufacturing Co. in the sum of \$198,000 Subject to the following conditions:

- (a) That said Trustee in Bankruptcy can vest in the Company good title to said land, free of all claims, liens, encumbrances, conditions, restrictions, reservations, easements and rights of way, except that certain oil and gas lease hereinafter mentioned and except such matters as may be approved by the Company and that said Trustee provide the Company with a title policy in the principal amount of \$180,000 evidencing a good title as aforesaid.
- (b) That the Company's title to said land shall include all minerals, oil, gas and other hydrocarbon substances in, on or produced from said land, but reserving and excepting unto said Trustee in Bankruptcy all rents, royalties, and other things of value accruing pursuant to and prior to the expiration, surrender or other termination of that certain oil and gas lease dated January 14, 1938, by and between said Trustee in Bankruptcy et al., as Lessors, and the Universal Consolidated Oil Company, as Lessee, [9] and recorded in the office of the County Recorder of the County of Los Angeles in Book 15515, Page 326 Official Records, subject, however, to Trustee's obligation to pay all taxes relating to oil, gas or hydrocarbon substances in,

on or under said land prior to the expiration, surrender or other termination of said lease.

- (c) That said Trustee in Bankruptcy procure a letter addressed to the Company and executed by the proper officials of the Universal Consolidated Oil Company in a form approved by counsel for the Company and granting permission to the Company to use that portion of said land outlined on the map attached hereto as Exhibit A as a baseball park and a parking area.
- (d) That said Trustee in Bankruptcy pay all costs and expenses of every kind and nature pertaining to the removal of all obstructions on that portion of said land outlined on the map attached hereto, including, but without limiting the generality of the foregoing, all storage tanks, power poles, oil lines, sumps, steam lines and concrete walls (excepting the wall located upon the easterly border of said land).
- (e) That said Trustee in Bankruptcy pay all commissions relating to this transaction.
- (f) That said sale be consummated and a final order approving such sale be procured within sixty (60) days from October 27, 1947.

5. That petitioner is informed and believes and on such information and belief alleges that the cost of removing all of the storage tanks, power poles, oil lines, sumps, steam lines and walls mentioned in subdivision (d) of paragraph 4 hereof will be approximately between \$15,000 and \$16,000. Petitioner intends to have a [10] more definite statement of said costs available at the hearing of this petition.

6. That petitioner obtained from Universal Consolidated Oil Company oral permission to remove said storage

tanks, etc., mentioned in subdivision (d) of paragraph 4 hereof on condition that said Trustee in Bankruptcy pay the cost thereof. Petitioner proposes to have said approval or consent in writing available at the hearing of this petition.

7. That the said real property has been appraised and a copy of said appraisal is on file herein.

8. That subject to the approval of this Court, said petitioner has agreed to sell said real property to said The Procter & Gamble Manufacturing Co. for \$198,000 cash lawful money of the United States, subject to the conditions hereinbefore set forth.

9. That petitioner believes said sale is fair and adequate and to the best interests of the estate and the creditors thereof.

Wherefore Petitioner Prays:

1. That notice of the hearing of this petition be given as required by law.
2. That upon the hearing of said petition an order be made herein authorizing petitioner to sell said real property.
3. That the sale of said real property to The Procter & Gamble Manufacturing Co., a corporation, be approved and confirmed, Subject to the conditions set forth in the offer as hereinbefore set forth.
4. That petitioner be authorized to enter into a contract for the removal of the tanks, poles, oil lines, sumps, etc. set forth in subdivision (d) of paragraph 4 of this petition, in order to comply with the terms of the said offer.
5. That on payment of the purchase price of said real [11] property petitioner and Security-First National Bank of Los Angeles be authorized to exe-

cute and deliver to said purchaser a deed or deeds to said real property, reserving, however, unto the sellers all interests and rights, rents, royalties and other things of value accruing to Lessors pursuant to the said oil and gas lease made and entered into with the Universal Consolidated Oil Company, as lessee, hereinbefore referred to.

6. That out of the proceeds of said sale said petitioner be authorized to pay the following:
 - (a) All expenses incident to said sale including without limitation thereto the recording charges, escrow fees, title fees, internal revenue stamps.
 - (b) All expenses incurred by petitioner in the matter of removing all storage tanks, power poles, oil lines, sumps, steam lines and concrete walls mentioned in the offer hereinbefore set forth.
 - (c) All other expenses incident to the consummation of said sale pursuant to said offer.
7. For such other and further relief as may be proper.

H. F. METCALF

As Trustee in Bankruptcy of F. P. Newport
Corporation, Ltd., Petitioner

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for Said Trustee [12]

[Verified.]

[Endorsed]: Filed Oct. 27, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith,
Clerk. [13]

[Title of District Court and Cause]

OBJECTIONS OF CREDITORS AND OF THE
BANKRUPT TO PROPOSED SALE OF REAL
PROPERTY

.

Now come Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport and Eugene P. Clark, creditors of the above named bankrupt corporation, whose claims are on file herein, and F. P. Newport Corporation, Ltd., a corporation, the above-named bankrupt, and object to the petition of H. F. Metcalf, as trustee in the above entitled matter filed herein on or about October 27, 1947, entitled "Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Proctor & Gamble Manufacturing Co., a corporation," and to the granting of any of the authorizations, orders, or relief prayed for thereunder and as grounds of objection, allege:

I.

That the lands described in said petition have a fair market value in the sum of Four Hundred Thousand Dollars (\$400,000.00) and the offer received by the said trustee in the sum of \$198,000.00 as reported in said petition, is an entirely inadequate price being less than one-half of the present fair market value of said [14] lands.

II.

That said lands were appraised, by a thoroughly competent appraiser, about a year ago, who rendered his report to the above named bankrupt herein, in furtherance of the reorganization plans of said bankrupt, wherein he

stated that said lands had a fair market value in the sum of \$391,386.60.

That your objectors are informed and believe and for such reasons allege that because of the tremendous development program by the City of Long Beach, now under way in reference to its harbor, and for other well known reasons, that the fair market value of said lands has increased since said appraisal was made.

III.

That the condition set forth in subparagraph "(b)" of paragraph "4" of said petition, that the trustee shall convey to the buyer "all minerals, oil, gas and other hydrocarbon substances, in or produced upon said lands," reserving only to the trustee the rents or royalties under the present lease with Universal Consolidated Oil Company, is not only inequitable and unjust and highly dangerous in a business sense as to the trustee, but will, as your objectors are informed and believe and for such reasons allege, operate to the detriment of the within estate and to their rights therein by causing a loss to the estate which may exceed in amount the total purchase price of \$198,000.00 offered by the proposed purchaser, and in this regard objectors specify as follows:

- (a) That your objectors have been informed by thoroughly competent authorities, and they believe and for such reasons allege that because of the difference in value to royalty buyers between minerals, in places owned by the seller, and rents and royalties under a lease, that the value of the estate herein of its interest in the oil and gas yet to be [15] recovered from said lands, will drop fifty per cent (50%) immediately upon the transfer of

said lands under said condition, and that said depreciation will take place solely because of said condition;

- (b) That in addition the within estate, under said condition, and notwithstanding said reservation will be in grave danger of taking an equally great loss by being deprived in the future of all rents and royalties, now being received by said trustee, through his present lease with the Universal Consolidated Oil Company. The reason is obvious. Universal Consolidated Oil Company has the right to abandon its lease with the trustee at any time by quitclaiming the demised premises to said trustee, or otherwise.

If that were done today the trustee has a perfect legal right to lease said lands to other oil companies. It is common knowledge that in the Los Angeles Basin lands are frequently leased profitably after the original lessee-producer has abandoned his lease. The trustee would also have the right, following such abandonment or quitclaiming to enter upon the said lands and produce the wells now located thereon taking the entire production to himself.

Both of said rights will be immediately lost to the trustee because of said condition.

It is equally obvious, that the proposed purchaser could under said condition, with perfect legal right, approach said Universal Consolidated Oil Company the day after the proposed purchaser acquired title, as proposed, and offer to said Oil Company, any sum from one dollar to a million dollars that it

thought said Oil Company would accept, as an inducement to abandon its lease or [16] to quit-claim said described lands.

And the day after that happened the purchaser could lease the same lands with perfect legal right to Universal Consolidated Oil, or to any other person, and the trustee would not only no longer have any interest in the oil and gas produced from said lands or the rents or royalties therefrom, but he would have no right to complain of any such transaction, because under said condition he not only leaves himself "wide open" to the happening of such a transaction but, even though unintentionally, he almost invites it.

III.

That your objectors are informed and believe and for such reasons allege that underlying the oil sands now being produced upon said lands by Universal Consolidated Oil Company, are two additional oil sands that can be produced profitably, at least as to a part of said lands.

That said lower oil sands are known as "The Ford Zone" and "The 237 Zone." Both of those zones are now being produced profitably on adjacent and adjoining lands from wells that are as to one at least, but a few hundred feet from wells now on the lands proposed to be sold under said condition.

That Universal Consolidated Oil Company has not produced from either of said lower zones and may or may not be interested in producing therefrom. Your objectors are informed and believe and for such reasons allege that under now existing conditions the said trustee has the right to produce from said lower sands, either through his own

operations, or by contract with other oil companies, in the event that Universal Consolidated Oil Company should:

1. Elect not to produce from said lower sands; or
2. Quitclaim said lands; or
3. Abandon its said lease. [17]

The trustee's right to so produce upon the happening of any or all of said events is, however, one that no longer exists ipso facto with the transfer as proposed of the title to said land under said condition.

Your objectors are informed and believe and for such reasons allege that the loss to the said trustee and to the within estate thereby could also be a sum greater than the total purchase price offered of \$198,000.00.

That your objectors are informed and believe and for such reasons allege that said trustee has received and banked one million two hundred thirty-one thousand, nine hundred one dollars and eighty seven cents (\$1,231,901.87) from royalties, cash bonus and oil bonus under said lease with Universal Consolidated Oil Company, which covers the approximate six (6) acres of ground now proposed to be sold and an adjacent three (3) acre parcel; and that the six acre parcel now proposed to be sold for \$198,000.00 together with "all minerals, oil, gas and other hydrocarbons substances in or produced upon said land --" (subject to the lease reservation), has produced oil and gas which has been sold for one million, three hundred forty-one thousand, three hundred sixty-three dollars and four cents (\$1,341,363.04) of which sum the said trustee has been paid exclusive of a \$25,000.00 cash bonus, under the lease on all of said lands, and under a \$25,000.00 bonus, in oil under the lease on all of said lands, the sum of four hundred sixty-nine thousand four hundred seventy-seven dollars and six cents (\$469,477.06).

IV.

That said proposed offer of \$198,000.00 is not in reality an offer in that sum for as set forth in subparagraph “(d)” of said paragraph “4” the proposed purchaser attaches still another condition to his offer and that is that the trustee shall pay all costs of moving “all storage tanks, power poles, oil lines, sumps, steam [18] lines and concrete walls” (one concrete wall excepted) now located on said lands.

That, in the opinion of your objectors this is an operation that said trustee should in no event engage in. It is apparent that if the trustee, while engaged in such operation, should cause loss of life, or damage to property through explosion, fire, flooding or for any other cause that the within estate might be held liable in damages in very great sums of money.

In paragraph “5” of said petition the trustee states that he believes that the cost of removal can be limited to between \$15,000 and \$16,000. There is no assurance, however, that the estate will not actually pay out double or treble those sums. Your objectors are informed and believe and for such reasons allege that the said trustee has until very recently estimated the cost of such removal at approximately \$33,000.00.

V.

That said proposed sale is not to the best interest of the within estate or to the creditors thereof for the following additional reasons:

- (a) That after the trustee shall deduct from said \$198,000.00 the cost of removal of said tanks and equipment, and the commissions (if any) and the expenses of sale, and the Federal and State Income

Taxes, necessarily arising from such sale which taxes cannot be definitely determined at this time because of the uncertainty as to the actual cost of removal of said tanks, and equipment, but which are substantial, the net sum remaining will be so small that the loss of this valuable six acres of waterfront property, coupled with the possible loss of all of the oil yet to be produced therefrom, will be entirely without justification; [19]

- (b) That the Debtor's ability to rehabilitate himself by a plan of reorganization, now under way with the aid and co-operation of a number of his important creditors, will in no way be aided by such an insignificant sum of money but will on the contrary be delayed and possibly defeated as shown in the next succeeding paragraph;
- (c) That if hereafter the said trustee as Lessor and Universal Consolidated Oil Company as Lessee desired to extend the term of said lease or to modify said lease for their mutual gain and advantage they would be totally unable to do so without the consent of said proposed purchaser, and it should be self-evident that such consent would be withheld. The legal question that arises under such consideration has possibly been decided in an oil and gas case by the Supreme Court of Oklahoma and the precise question has recently been placed before the California Supreme Court, which Court has referred the matter to the District Court of Appeal for the Fourth District for decision.

VI.

That the bankrupt above named has for a number of months been working upon a plan of reorganization where-

by the within estate which has been operated in bankruptcy will be removed from bankruptcy, with the consent of all interested parties, and thereafter conducted by its officers. In furtherance of such plan the said bankrupt has negotiated with financial institutions for a loan in the sum of four hundred thousand dollars (\$400,000.00) which loan would be secured by a [20] first lien upon all of the remaining assets of said bankrupt, including the said six acres of waterfront property now proposed to be sold by said trustee, and, in addition has sought a seventy-five thousand dollars (\$75,000.00) six months credit which would enable it to develop a new subdivision upon the lands of the within estate near Verdugo Woodlands.

That your objectors, other than the said bankrupt, are informed and believe and for such reasons allege that the said bankrupt has been successful in negotiating said \$75,000.00 credit and an agreement with a responsible financial organization for a first lien loan in the sum of \$400,000.00 and that in furtherance of said plan the properties of the within estate have been appraised, including said six (6) acres of waterfront property, and that because of the high value placed upon said parcel through said appraisal and for other reasons that said loan cannot be made if said six acre parcel and the mineral rights thereunder are excluded from the security offered.

That the interests of the creditors herein, and of the bankrupt, will be best served by aiding the bankrupt to complete his plan of reorganization and rehabilitation, and in the opinion of the objecting creditors herein, the pro-

posed sales of said six acres of waterfront property, at said totally inadequate price and under the objectionable conditions set forth by the proposed buyer, can accomplish nothing except to delay or possibly defeat said plan, the net result of which could well be that these, and all other creditors, after years of patient waiting and of cooperation, would ultimately make no recovery.

Dated: November 11, 1947.

MRS. F. P. NEWPORT

MRS. MATHILDA OLSEN [21]

FAYE MacMILLEN PENDER

Attorney in Fact for Mrs. M. T. MacMillan

WILLIAM H. NEBLETT

By Henry Sruvi

Attorney

MRS. F. P. NEWPORT

EUGENE P. CLARK

F. P. NEWPORT CORPORATION, LTD.

By F. P. Newport

President

L. M. CAHILL

Attorney for Objectors

[Verified.] [22]

Received copy of the within Objections this 13 day of November, 1947. Bailie, Turner & Lake, Allen T. Lynch, Attorneys for Appellee and Petitioner.

[Endorsed]: Filed Nov. 13, 1947. Hugh L. Dickson, Referee.

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

OBJECTIONS OF RUBY E. NEBLETT TO PROPOSED SALE OF PROPERTY OF BANKRUPT TO PROCTOR & GAMBLE COMPANY

To the District Court of the United States for the Southern District of California, Central Division:

Now comes Ruby E. Neblett and represents as follows:

That she is the equitable owner of certain corporate stock of the Bankrupt and hereby objects to the proposed sale of the area of land containing approximately six (6) acres and located at Wilmington, California, to the Proctor & Gamble Company upon the following grounds:

1. Your objector incorporates as though fully set forth herein, those certain grounds set forth in *objects* filed herein by Dorothy Day and others.
2. The record does not indicate that a sufficient public advertisement of the sale of the property has been made to enlist the interest of proposed buyers able and willing to purchase land of the character proposed to be sold.
3. The contemplated sale price of the property does not appear to be its fair market value in view of the statement of the Trustees herein, made by written communication to the referee herein, [24] dated July 2, 1947, to the effect that the Trustee was asking \$374,000.00 for the Wilmington property.
4. The terms of the sale, in imposing upon the Trustee the obligation to remove the obstruction upon the property, would create a possible liability for damages incurred in the operation and doubt may exist as to the extent of the power of the Trustee to engage in such operation.

Dated: This 12th day of November, 1947.

Respectfully submitted,

RUBY E. NEBLETT

ROSCOE R. HESS

Attorney for Objector [25]

[Verified.]

[Endorsed]: Filed Nov. 13, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith,
Clerk. [26]

[Title of District Court and Cause]

MEMORANDUM IN SUPPORT OF PETITION FOR
AUTHORITY TO SELL AND FOR CONFIRMA-
TION OF SALE OF REAL PROPERTY TO THE
PROCTOR AND GAMBLE MANUFACTURING
COMPANY, A CORPORATION

Comes now the Security-First National Bank of Los Angeles and submits the following memorandum and alleges:

I.

That petitioner is a secured creditor of the bankrupt estate, holding the real property the subject of the proposed sale and other assets under a trust declaration, executed by the bankrupt as security for the payment of the bankrupt's obligation to petitioner.

II.

That in 1935 the bankrupt was in default in the payment of its obligation to petitioner and petitioner in-

stituted proceedings to foreclose the security held by it under its trust declaration. On March 27, 1935, a petition for involuntary bankruptcy was filed against the bankrupt corporation and as a result thereof, petitioner was enjoined from prosecuting its foreclosure proceedings. On January 12, 1937, the bankrupt corporation was [27] indebted to the petitioner in the sum of One Million, Three Hundred and Fifty-one Thousand, Seven Hundred and Twenty-nine Dollars and Thirty-eight Cents (\$1,351,729.38) and that on said date, a written agreement was entered into between the bankrupt corporation, H. F. Metcalf, its receiver, and petitioner, whereby petitioner waived its right to collect Eighty-one Thousand, Two Hundred and Seventy-eight Dollars and Twenty-six Cents (\$81,278.26) of bankrupt's obligation to petitioner, and petitioner reduced its rate of interest from six (6%) per cent to four (4%) per cent on the unpaid principal balance, and the bankrupt corporation and H. F. Metcalf, its receiver, agreed that the assets of the bankrupt would be liquidated and all of petitioner's obligation paid in full by March 1, 1940, or that the bankrupt and the said receiver would not seek to enjoin nor delay foreclosure of the assets held by petitioner as security for the payment of its obligation. That said agreement and its supplement were signed by the bankrupt corporation, by F. P. Newport, its President, and by H. F. Metcalf as receiver and as Trustee in bankruptcy for the creditors of said bankrupt. That on August 13, 1937 this Court by written order approved said agreement. That there is now due, owing and unpaid to petitioner on said obligation, a principal balance of Three Hundred and Twenty Thousand, Two Hundred and Twenty-two Dollars and Eighty-five Cents (\$320,222.85). That since January 1, 1946, petitioner has received on account of principal only the sum of Eighty-

three Thousand, Four Hundred and Eighty-five Dollars and Fifty-eight Cents (\$83,485.58), of which sum Thirty-seven Thousand, Two Hundred and Fifty-three Dollars and Thirty-eight Cents (\$37,253.38) was received from the oil payments from the Universal Consolidated Oil Company. That only the sum of Forty-six Thousand, Two Hundred and Thirty-two Dollars and Twenty Cents (\$46,232.20) has been received by petitioner from liquidation of assets since January 1, 1946. [28]

III.

That this bankruptcy proceedings has been pending for a period in excess of twelve (12) years and that on numerous occasions, the referee in charge of the proceedings has stated that the assets should be liquidated and the bankruptcy proceedings terminated. That in 1943 your petitioner made a motion before Referee Ernest R. Utley for permission to foreclose on its trust declaration and the said referee, in refusing to grant permission for said foreclosure, stated at the hearing on said petition, held on June 20, 1944, that he would grant the trustee a limited period of time in which to liquidate the assets and stated that that period of time should not exceed one year. That in spite of said instruction from the said referee, and the January 12, 1937 agreement of the bankrupt corporation and the trustee in bankruptcy and the August 13, 1937 order of this Court approving said agreement, this bankruptcy proceedings has been continued and the attempt to liquidate the assets has been opposed and delayed by the bankrupt corporation, its officers and stockholders and some of its unsecured creditors.

IV.

That on numerous occasions, when this Court has had petitions before it to confirm the sale of assets or for per-

mission to foreclose the trust declaration, representations have been made to this Court by the bankrupt corporation through its officers that refinancing programs were in progress; that in spite of said representations, never during the bankruptcy proceedings, lasting in excess of twelve (12) years has a refinancing program been submitted to this Court or the creditors of the bankrupt estate.

V.

That petitioner is informed and believes and therefore alleges that recently the Universal Consolidated Oil Company drilled an oil well located on the property the subject of the [29] proposed sale, into the so-called Ford zone oil sands and that said well was unsuccessful.

VI.

That One Hundred and Ninety-eight Thousand (\$198,000.00) Dollars is a reasonable price for the property offered for sale and the fair market value of said property is not in excess of said sum.

Wherefore, petitioner prays:

1. That the petition for authority to sell and confirmation of sale of real property to Proctor and Gamble Manufacturing Company be approved; and
2. For such further relief as is equitable.

SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By Paul E. Iverson

Attorney for Security-First National Bank
of Los Angeles [30]

[Verified.]

[Endorsed]: Filed Nov. 24, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith,
Clerk. [31]

[Title of District Court and Cause]

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Be It Remembered, that heretofore and on or about the 27th day of October, 1947, the trustee in bankruptcy herein, filed with this court his petition for authority to sell, and for confirmation of sale of certain real property in said petition, and hereinafter described; that said petition came on regularly for hearing before this court, pursuant to notice duly given as required by law, on the 13th day of November, 1947, at the hour of 10:00 o'clock A. M. of said day, and was thereupon duly continued until the 21st day of November, 1947, at the same hour and place, and on said last mentioned date, said matter came on regularly for hearing and was thereupon continued until the 24th day of November, 1947, at the same hour and place; that on the last mentioned date, said matter came on regularly for hearing before this court at the hour of 10:00 o'clock A. M., Messrs. Bailie, Turner and Lake, by Allen T. Lynch, appearing as attorneys for petitioner, trustee in bankruptcy herein; Paul E. Iverson, Esq. appearing as attorney for the [32] Security-First National Bank of Los Angeles, a secured creditor; Edmund Nelson, Esq., appearing as attorney for the Bank of America, a secured and unsecured creditor herein; L. M. Cahill, Esq. appearing as attorney for Dorthy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport and Eugene P. Clark, each of whom has filed a claim as an unsecured creditor of said estate, and F. P. Newport Corporation, Ltd., the bankrupt corporation; Roscoe R. Hess, Esq. appearing as attorney for Ruby E. Neblett, alleged equitable owner of certain stock of the bankrupt corporation; O'Melveny and Myers, by Richard C. Ber-

gen, appearing as attorneys for the Procter & Gamble Manufacturing Co., and written objections to said sale having been filed for and in behalf of said Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene P. Clark, F. P. Newport Corporation, Ltd., and Ruby E. Neblett, and Bank of America having, in open court, joined in said written objections, and upon said date and from time to time thereafter until the conclusion of said hearing, evidence having been offered and received for and against said sale, and certain stipulations having been made in open court, and the court having considered said evidence and said stipulations, and the argument of counsel, and being fully advised in the premises,

FINDS

1. That the matters and things alleged in paragraphs 1 to 4, both inclusive, of the said petition for authority to sell, filed herein by the trustee in bankruptcy, are and each of them is true.

2. That in addition to agreeing to purchase said property, subject to the terms of the Universal Consolidated Oil Company gas lease referred to in said written offer, the Procter & Gamble Manufacturing Co. further offered in open court to purchase said property at said price, subject to all easements, restrictions and rights of way and restrictions of record, if any, and subject to the [33] terms, conditions and provisions of that certain contract relating to said property, made and entered into by and between said trustee in bankruptcy, F. P. Newport Corporation, Ltd., Security-First National Bank of Los Angeles and Universal Consolidated Oil Company, as parties of the first part, and City of Long Beach, a municipal corporation, and its Board of Harbor Commissioners, as

parties of the second part, a copy of which contract is attached to and made a part of the petition filed in these proceedings by said trustee in bankruptcy on the 12th day of December, 1940, and entitled "Petition for Order Authorizing H. F. Metcalf, as Trustee to Execute Certain Agreements with the City of Long Beach, et al."

3. That the work required to be done by the trustee in bankruptcy, in order to make available a certain portion of the surface of said property for the use of the Procter & Gamble Manufacturing Co., as required by its offer, can be performed at a cost to this estate of approximately \$20,378.00.

4. That the matters and things alleged in paragraphs 6, 7, 8 and 9 of the trustee's said petition for authority to sell, hereinbefore referred to, are and each of them is true.

5. That the said property was duly appraised by Thomas Cunningham, appointed by this court for said purpose, at \$211,462.00.

6. That due and proper notice of the hearing of said petition, so filed by the trustee in bankruptcy, has been given.

7. That the said trustee in bankruptcy has advertised said property for sale in newspapers of general circulation, and by informing many real estate brokers, dealing in similar properties, of his desire, as such trustee, to sell said property, and has solicited them to secure offers therefor.

8. That said trustee in bankruptcy offered said property in open court for sale to the highest and best bidder, and that the said offer so bid and so made by the Procter & Gamble Manufacturing Co., is the best offer or bid made

for said property, and is [34] the best offer or bid received by said trustee in bankruptcy therefor.

9. That said F. P. Newport Corporation, Ltd. was adjudicated a bankrupt on January 12, 1937, and said offer or bid so made is the best firm offer or bid received for said property since said date.

10. That the Security-First National Bank of Los Angeles has approved the sale of said property at said price, and subject to said conditions, and has filed a written memorandum recommending said sale.

11. That Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene P. Clark and Bank of America have filed, in the bankruptcy proceedings herein, unsecured claims against the bankrupt corporation in the approximate sum of \$140,000.00, which is approximately 70% of the unsecured claims so filed in this proceeding.

12. That it is not now known whether or not oil and gas could or can be produced in commercially profitable quantities from any undeveloped strata or zones, which may underlie said real property.

13. That no plan of re-organization of this bankrupt has been submitted to the creditors of this estate, or to the court.

14. That a loan of \$500,000.00 would not be sufficient to pay the creditors of this estate, and the expense of administration.

15. That the objections, and each of them, made to said sale are without merit.

16. That Joseph Sattler, Esq., a duly licensed real estate broker, has performed services as a broker in producing said bidder, and is entitled to a commission for

his services in that respect, and the sum of \$5,000.00 is a reasonable sum to be paid to him as commission for his said services. [35]

As Conclusions of Law From the Foregoing Findings of Fact, the Court Concludes That,

1. That the offer so made, as hereinbefore found by the Procter & Gamble Manufacturing Co., is fair and adequate and represents the reasonable market value of said property, and is the best offer received for said property.

2. That the trustee in bankruptcy has been diligent in his efforts to sell said property, and the advertising and effort made by him in that respect, have been sufficient and adequate to enlist the interest of proposed buyers, able and willing to purchase.

3. That the sale of said property to the Procter & Gamble Manufacturing Co., at the price and upon the terms and conditions hereinbefore filed, is to the best interests of this estate and the creditors thereof, and should be confirmed.

4. That the objections made to said sale, hereinbefore filed, are without merit and should be overruled and denied.

Therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered:

1. That H. F. Metcalf, as trustee in bankruptcy herein, be and he is hereby authorized to sell that certain real property being a portion of the Rancho Los Cerritos situate in the City of Long Beach, County of Los Angeles,

State of California, and more particularly described as follows:

Beginning at the most Southeasterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577, Page 105 of Deeds, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed, North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence [36] South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 500 feet to the point of beginning.

together with all minerals, oil, gas and other hydrocarbon substances in, on or produced from said land. But Reserving and Excepting, However, unto Security-First National Bank of Los Angeles, and H. F. Metcalf, as trustee in bankruptcy of the above entitled bankrupt estate, as their interests may appear, and to their assigns and successors, all rents, royalties and other things of value accruing pursuant to or by virtue of (and prior to the expiration, surrender or other termination thereof) that certain oil and gas lease dated January 14, 1938, and entered into by and between said trustee in bankruptcy and said Security-First National Bank of Los Angeles, and others, as lessors, and the Universal Consolidated Oil Company, as lessee, and recorded in the office of the County Recorder of the County of Los Angeles, in Book 15515, Page 326, Official Records of said county; and subject to the following, to-wit:

(a) All restrictions, reservations, easements and rights of way of record, if any.

(b) The terms, conditions and provisions of that certain contract relating to said property and made and entered into by and between said trustee in bankruptcy, F. P. Newport Corporation, Ltd., Security-First National Bank of Los Angeles and Universal Consolidated Oil Company, as parties of the first part, and City of Long Beach, a municipal corporation, and its Board of Harbor Commissioners, as parties of the second part, copy of which contract is attached to and made a part of the petition filed in these proceedings by said [37] trustee in bankruptcy, on the 12th day of December, 1940, and entitled "Petition for Order Authorizing H. F. Metcalf, as Trustee, to Execute Certain Agreements with the City of Long Beach, et al."

(c) The last half of 1947 and 1948 taxes.

2. That the sale of said real property, subject to said reservations, conditions, easements, restrictions and taxes, as hereinbefore noted, to the Procter & Gamble Manufacturing Co., a corporation, for the sum of \$198,000.00, be and it is hereby confirmed, subject, however, to the following additional conditions:

(a) That the said trustee in bankruptcy procure a letter addressed to the Procter & Gamble Manufacturing Co., and executed by the Universal Consolidated Oil Company, per its officers thereunto duly authorized, and in form approved by counsel for the Procter & Gamble Manufacturing Co., which letter shall, by its terms, grant permission to said purchaser

to use a portion of the land as a baseball park and parking area, the land to be so used, being designated and described in map which is trustee's Exhibit "1" in this proceeding.

(b) That the trustee in bankruptcy shall cause to be removed, at the expense of this estate, all construction on that portion of the land outlined on said map hereinbefore mentioned, including, but without limiting the generality of the foregoing, all storage tanks, power poles, oil lines, sumps, steam lines and concrete walls (excepting the wall located on easterly boundary of said land).

(c) That this order confirming and approving this sale shall become final within Sixty (60) days [38] from October 27, 1947, provided, however, that the purchaser may waive this condition in its discretion.

3. The trustee in bankruptcy herein is hereby authorized to make and enter into such contracts as may be necessary and proper to consummate this sale in accordance with the foregoing conditions, and to secure such liability policy or policies as he may deem necessary in connection with any contract or contracts so made.

4. That the trustee in bankruptcy be and he is hereby authorized to pay out of the proceeds of said sale, when and as received by him, the following:

(a) All expenses incident to the performance by him of such conditions of said sale as are requested to be performed by him.

(b) The sum of \$5,000.00 to Joseph Sattler, Esq., a duly licensed real estate broker, costs of policy title insurance, escrow fees, internal revenue stamps, recording charges, and any and all other expenses incident to said sale.

(c) The balance of the proceeds of said sale, when and as received by him, trustee shall pay to the Security-First National Bank of Los Angeles; payment of such remainder of the balance to said bank is directed by the court, without determination at this time of the question of whether or not such remaining funds, or any part thereof, may be used for the payment of other costs of sale or expenses of administration, this court hereby reserving jurisdiction to determine that question at a future date. In the event this court shall determine, and such decision shall become final, that said remaining [39] funds can or could have been used for payment of any other costs or expenses of administration, then, in that event, the court reserves jurisdiction to direct payment thereof out of any other funds that may come into the possession and/or control of the trustee in bankruptcy herein.

5. That the monies directed to be paid herein to Security-First National Bank of Los Angeles shall be applied by it in accordance with the agreement of January

12, 1937, supplement thereto and modifications thereof, referred to in the trustee's said petition.

6. Trustee in bankruptcy shall pay out of the assets of this estate, from time to time, as they may become due and payable, all taxes relating to the oil, gas or hydrocarbon substances in, on or under said land, and which shall be assessed and become payable prior to the expiration, surrender or other termination of said lease of January 14, 1938, made and entered into by and between said trustee in bankruptcy and others, as lessors, and Universal Consolidated Oil Company, as lessee, and hereinbefore referred to.

Dated this 19 day of December, 1947.

HUGH L. DICKSON

Referee in Bankruptcy

Approved as to form: Paul E. Iverson, Attorney for Security-First National Bank of Los Angeles. Edmund Nelson, Attorney for Bank of America. L. M. Cahill, Attorney for Certain Creditors and the Bankrupt. Roscoe R. Hess, Attorney for Ruby E. Neblett. O'Melveny and Myers, By Richard C. Bergen, Attorneys for Procter & Gamble Manufacturing Co.

[Endorsed]: Filed Dec. 11, 1947. Hugh L. Dickson, Referee.

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

PETITION TO REVIEW REFEREE'S ORDER

To Honorable Hugh L. Dickson, Referee in Bankruptcy:

Your petitioners respectfully show:

I.

That they are the above named bankrupt and certain creditors of F. P. Newport Corporation, Ltd., a corporation, the above named bankrupt, whose claims have been allowed herein.

II.

That in the course of the proceedings herein the trustee on or about October 27, 1947, filed his petition herein for an order authorizing the sale of certain real property of the bankrupt estate for \$198,000 less the cost of removing certain oil well equipment to Procter and Gamble Manufacturing Company. That said property consists of six acres of land located on Channel No. 3 in the Long Beach Harbor having 500 feet of frontage on said channel upon which are producing oil wells. [41]

III.

That thereafter and on or about November 12, 1947, written objections were filed to said proposed sale by creditors Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport and Eugene P. Clark and by the bankrupt, separate written objections were filed thereto, on or about said day by Ruby E. Neblett.

IV.

That on or about November 13, 1947, a hearing was held before said referee, upon said matter, at which time

Bank of America National Trust and Savings Association, a creditor of said bankrupt, appeared and joined in the written objections set forth upon behalf of said creditors and the bankrupt.

V.

That the said written objections of Ruby E. Neblett after incorporating by reference the said written objections of Dorothy Day and others, set forth the following:

- "2. That the record does not indicate that a sufficient public advertisement of the sale of the property has been made to enlist the interest of proposed buyers able and willing to purchase land of the character proposed to be sold.
- "3. The contemplated sales price of the property does not appear to be its fair market value in view of the statement of the Trustee herein, made by written communication to the referee herein dated July 2, 1947 to the effect that the Trustee was asking \$374,000 for the Wilmington property.
- "4. That the terms of the sale, in imposing upon the Trustee the obligation to remove the obstruction upon the property, would create a possible liability for damages incurred in the operation and doubt may exist [42] as to the extent of the Power of the Trustee to engage in such operation."

V.

That the written objections of Dorothy Day and other creditors alleged that the said six acres had been appraised as having a fair market value in the sum of \$391,386.60, as of about a year ago and that the value had since increased, and after objecting to the sale at a price of \$198,000 less \$15,000 or \$16,000 to be paid for the re-

moval of oil well equipment set forth the following objection:

“That the condition set forth in subparagraph ‘(b)’ of paragraph ‘4’ of said petition, that the trustee shall convey to the buyer ‘all minerals, oil, gas and other hydrocarbon substances, in or produced upon said lands,’ reserving only to the trustee the rents or royalties under the present lease with Universal Consolidated Oil Company, is not only inequitable and unjust and highly dangerous in a business sense as to the trustee, but will, as your objectors are informed and believe and for such reasons allege, operate to the detriment of the within estate and to their rights therein by causing a loss to the estate which may exceed in amount the total purchase price of \$198,000.00 offered by the proposed purchaser, and in this regard objectors specify as follows:

- (a) That your objectors have been informed by thoroughly competent authorities, and they believe and for such reasons allege that because of the difference in value to royalty buyers between minerals, in places owned by the seller, and rents and royalties under a lease, that the value of the estate herein of its interest in the oil and gas yet to be recovered from said lands, will drop fifty percent (50%) immediately upon the transfer of said lands under said condition, and that said [43] depreciation will take place solely because of said condition;
- (b) That in addition the within estate, under said condition, and notwithstanding said reservation will be in grave danger of taking an equally great loss by being deprived in the future of all rents and royalties, now being received by said trustee, through his present lease with the Universal Con-

solidated Oil Company. The reason is obvious. Universal Consolidated Oil Company has the right to abandon its lease with the trustee at any time by quitclaiming the demised premises to said trustee, or otherwise.

If that were done today the trustee has a perfect legal right to lease said lands to other oil companies. It is common knowledge that in the Los Angeles Basin lands are frequently re-leased profitably after the original lessee-producer has abandoned his lease. The trustee would also have the right, following such abandonment or quitclaiming to enter upon the said lands and produce the wells now located thereon taking the entire production to himself.

Both of said rights will be immediately lost to the trustee because of said condition.

It is equally obvious, that the proposed purchaser could under said condition, with perfect legal right approach said Universal Consolidated Oil Company the day after the proposed purchase acquired title, as proposed, and offer to said Oil Company, any sum from one dollar to a million dollars that it thought said Oil Company would accept, as an [44] inducement to abandon its lease or to quitclaim said described lands.

And the day after that happened the purchaser could re-lease the same lands with perfect legal right to Universal Consolidated Oil Company, or to any other person, and the trustee would not only no longer have any interest in the oil and gas produced from said lands or the rents or royalties

therefrom, but he would have no right to complain of any such transaction, because under said condition he not only leaves himself 'wide open' to the happening of such a transaction but, even though unintentionally, he almost invites it."

VI.

Said written objections of Dorothy Day and others also objected to said sale upon the ground that two lower oil sands known as "The Ford Zone" and "The 237 Zone," which are producing profitably on adjacent lands had not been developed, as yet, upon said six acres and that under present conditions the Trustee herein could produce from said sands if the present lessee elected not to produce therefrom, or quitclaimed said lands, or abandoned its lease; but that this valuable right would be lost to the Trustee under the terms of the proposed sale; and that in the light of the fact that said six acre parcel and an adjoining three acre parcel had produced oil royalties to date, which had been received by said trustee in the sum of \$1,231,901.87 and that said six-acre parcel, alone, had produced oil to date of a total value of \$1,341,363.04; it would appear that it was very unwise to consummate said sale, because of the terms of said sale as demanded by the proposed purchaser, under which a loss might be suffered by the within Estate in a sum far in excess of the proposed total purchase price of \$198,000. [45]

VII.

Other objections set forth therein had to do with the lack of assurance that the obligation to be assumed by the trustee for the removal of said oil well equipment might not be double the estimated \$15,000 stated in his petition, and, that the small sum left after deducting whatever the

cost of such removal was from \$198,000 and the payment of income taxes from the profit from such sale from the remainder, would not only do the estate very little good, but would defeat the reorganization plan of the debtor which is predicated upon a loan committed in the sum of \$400,000, which loan required the security of the assets of the bankrupt including said six acre parcel.

VIII.

Hearings having been held upon said petition and said objections on November 13, 1947, and on various days thereafter, and expert witness having been called and having testified as to the present fair market value of the said land, and as to the oil thereon, and as to the practical and legal effect of the said sale under the terms proposed by the buyer, as to the transfer of the mineral rights and the matter having been submitted for decision; the Referee did on December 19, 1947, make his order which was thereupon entered herein. That a copy of said order is hereto annexed, marked "Exhibit A" and made a part hereof as if fully set forth at this place.

IX.

That said order was and is erroneous in that:

- (a) It, in effect, overrules and denies all of the said objections, notwithstanding that the evidence presented and received in support of said objections not only fully supported and sustained said objections, but was practically uncontradicted as to all matters set forth in said objections with the single exception of the [46] question of present fair market value;

- (b) That it authorizes the sale by the Trustee, over the written objections of possibly a great majority of the creditors, of a valuable asset of the within estate at a grossly inadequate price, believed by your petitioners to be approximately one-half of the fair market value of said six acre parcel, which belief is supported by the testimony of the Witness Higgins, who, as Chief valuation engineer, for Southern Pacific Company, placed a value of \$60,000 per acre upon said six-acre parcel, same being exactly the value his company had placed upon its adjoining lands which he held to be exactly comparable;
- (c) That it authorizes the sale upon the terms demanded by the purchaser in reference to the transfer of the mineral rights, whereby the trustee, being no longer the owner of the minerals in place, but having only a royalty interest therein expressly limited to the present lease, will become immediately subject to the possibility of immediate and complete loss of the remaining oil and gas, not only as to the present producing sands, but also as to the said productive lower sands;
- (d) That said proposed sale is unwise in this, that it changes a sound business and legal relationship now existing, as to oil and gas remaining to be recovered from said lands, into an uncertain one subject not only in a certain sense, to the whim or caprice of the present lessee, but subject also to the facts that upon any day after the sale, either for a small or large consideration paid by the proposed buyer to the present lessee, or for no consideration whatsoever so paid, the Trustee can be fully and finally

divested of all [47] remaining interest in the oil and gas from said lands, by the present lessee simply informing the Trustee that he has quitclaimed said lands, as authorized in said lease, or, that he has abandoned said lease in its entirety;

- (e) That all of the testimony as to present fair market value has been ignored but said order is predicated upon findings that notes only an appraisal made in either December 1945, or January 1946, whereas all of the testimony as to present fair market value disclosed that all lands in the Long Beach Harbor area have greatly increased in the two year period that followed said appraisal;
- (f) That the trustee admitted that he has not advertised the property for sale in any manner, except a brief notice in the Los Angeles Daily Journal, notwithstanding the fact, that when he did extensively advertise said property for sale in January 1945. in newspapers in various large cities upon both coasts, that he received, in the then not nearly so favorable market, numerous inquiries from corporations, brokers and others;
- (g) That as late as July 2, 1947, the trustee believed that a buyer could be secured for said six acre parcel in the sum of \$374,000.00, for as shown by the evidence he wrote the Referee herein, on that day, to that effect;
- (h) That as shown by the uncontradicted evidence. the trustee will be required, under the drastic terms of sale imposed by the buyer, not only to assume the risk of damage to person and property through fire, explosion, or otherwise, through the removing

of the oil tank farm equipment to lands not proposed to be sold [48] at this time but also to pay from the funds of the within Estate the minimum sum of \$20,378.00 for such removal;

- (i) That it ignores the recommendation of A. A. Carrey, who has been the petroleum geologist and engineer advising the Trustee herein, as to the oil and gas upon said lands, for a number of years; that the said lands not be sold upon the drastic terms imposed by the buyer, as to the transfer of the mineral rights, because an immediate loss will be suffered by the Estate in the depreciation of the market value of the mineral rights. The uncontradicted testimony of Mr. Carrey on this point is in part as follows:

“In my opinion that if this sale is made that the present landowner the F. P. Newport Corporation, will suffer a decided loss in the sale value of their landowner’s interest”;

- (j) That it ignores the recommendation of Mr. Carrey that the sale be not made for an entirely different reason stated by him as follows:

“I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has not power to prevent the present operating company from terminating said lease, and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.”

(k) That it directs the payment of an alleged real estate brokers commission in the sum of \$5000 to an attorney at law, who is apparently also licensed as a real estate [49] broker, notwithstanding the fact that said attorney was at no time employed by the trustee herein in any capacity,—attorney, broker, or otherwise, and that it appears from the uncontradicted testimony that said attorney and the proposed purchaser entered into an agreement, without the knowledge of the trustee, that said attorney would be paid a “finders fee.” As such this obligation would appear to be that of the party found and not the obligation of the trustee who had no agreement in writing, as required by the laws of the State of California, with any person for his employment as a broker, or otherwise or at all.

In this regard it should be noted that the trustee herein is a licensed real estate broker, who is allowed fees from time to time for his services as trustee herein, including \$3000 allowed him on December 23, 1947, for services rendered in 1947, and, that the record herein discloses that said trustee, about the month of January 1945, received an offer of purchase from the present proposed purchaser, for the same six acre parcel, in the sum of \$180,000, which offer the trustee declined, he then having a higher offer; and that thereafter said attorney-broker conferred with the Referee herein and asked if a commission would be paid him if he was successful in finding a purchaser for said land; and that the referee expressed an opinion that a commission would be paid because

of the fact that he did not recall of sales of real estate being made before him where some real estate broker was not paid a commission; and that thereupon the said attorney wrote a letter to the corporation whose offer had been so declined by the trustee herein, and finding a continuing interest [50] in the property upon its part here thereupon entered into said agreement for a "finders fee."

The practice of buyers employing agents to secure scarce merchandise, or to induce reluctant owners to sell real estate, has developed in this period of scarcity, but the fee to be paid therefor is a fee to be paid by the buyer for whom the service is rendered, and is never a burden to be imposed upon the seller. In any event such fees are not contemplated by the provisions of the National Bankruptcy Act and cannot be sustained and most certainly not under the circumstances here;

- (1) That creditors herein have received no notice whatsoever as required by law of a hearing of a petition for the allowance to said attorney-broker of either a real estate commission or a "finders fee." The petition filed by the trustee herein failed to request authority to pay any such commission or fee to any person whomsoever and the notice thereof to creditors stated only the facts set forth in said petition.

X.

That the ability to rehabilitate itself, through a plan of reorganization now being worked out, with the aid and co-operation of a number of its important creditors, will in no way be aided by the approximate sum of \$140,000

which will remain after deducting expenses of equipment removal, income taxes, as shown by the letter of Western States Life Insurance Company, received in evidence herein, through the inability of the debtor to secure the loan proposed to be made by said Company in the sum of \$400,000, with said six acre parcel, it appearing that said Company's appraisers have placed a high value upon said parcel including the mineral rights in place; which facts were clearly established by the evidence upon said hearing, but which are disregarded entirely by [51] said order.

XI.

That no findings of any kind have been made upon the principal objections set forth in said written objections, your petitioners must therefor request that a transcript be prepared to include all matters received in evidence at said hearings, with the exception of the matters received by reference.

Wherefore, your petitioners pray for a review of said order by the Judge, and that said order be vacated and set aside.

Dated, December 29, 1947.

DOROTHY DAY

MARTHA McMILLEN

MATILDA OLSEN

WILLIAM H. NEBLETT

MRS. F. P. NEWPORT and

EUGENE CLARK

By L. M. Cahill

Their Attorney

F. P. NEWPORT CORPORATION, LTD.

By F. P. Newport
President

DOROTHY DAY

FAYE MacMILLAN PENDER

Attorney in Fact for Mrs. M. T. MacMillan

WILLIAM H. NEBLETT

By Henry Sriur
Attorney

MRS. F. P. NEWPORT

EUGENE P. CLARK

L. M. CAHILL

Attorney for Objectors [52]

Note: Findings of Fact, Conclusions of Law and Order appearing at this point are a copy of the Findings of Fact, Conclusions of Law and Order appearing at pages 26 to 35 of the Transcript of Record, so are not repeated. [53]

Received copy of the within Petition to Review this 29 day of December, 1947. Bailie, Turner & Lake, Attorneys for Trustee.

Received copy of the within Petition to Review this 29th day of December, 1947. O'Melveny & Myers, by Richard Bergen, Attorneys for Procter & Gamble Mfg. Co.

Received copy of the within Petition to Review. Paul E. Iverson, per M. Gable.

[Endorsed]: Filed Dec. 29, 1947. Edmund L. Smith, Clerk. [54]

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON REVIEW

(Sale to the Procter & Gamble Manufacturing Co.)

To the Honorable Paul J. McCormick, Judge of the
United States District Court, Southern District of
California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom
the proceedings in this matter were referred, do hereby
certify:

That on January 12, 1937, F. P. Newport Corporation,
Ltd., a corporation, was duly adjudicated a bankrupt, and
proceedings in relation to said bankrupt estate were duly
referred to this Referee.

That on March 18, 1937, H. F. Metcalf was duly
appointed Trustee in Bankruptcy of said bankrupt estate,
duly qualified as such, and ever since has been and now
is the duly appointed, qualified and acting Trustee in
Bankruptcy of said estate, and as such has been since
March 18, 1937, in possession and control of all of the
properties and assets of said bankrupt corporation.

That on October 27, 1947, the Trustee in Bankruptcy
duly filed with this Court a Petition for Authority to Sell
and [55] for Confirmation of Sale of Real Property to
the Procter & Gamble Manufacturing Co., a corporation.
(The original Petition is attached hereto and made part
hereof.)

Written Objections to said sale were duly filed for
and on behalf of certain creditors and the Bankrupt. Bank
of America, in open court, joined in said Objections and
adopted them as its Objections to said sale.

That the largest secured creditor, Security-First National Bank of Los Angeles filed a Memorandum in support of the Petition for Authority to Sell.

Said Petition and Objections came on regularly for hearing before this Court. Evidence, oral and written, was offered and received. Certain stipulations were made in open court. This Court made and signed its written Findings of Fact, Conclusions of Law and Order, authorizing and confirming the sale of said property to the Procter & Gamble Manufacturing Co. on the terms and conditions set forth in the said Order. (Original Findings of Fact, Conclusions of Law and Order is attached hereto and made part hereof.)

Thereafter a Petition to Review Referee's Order was duly filed by certain creditors, to-wit: Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport and Eugene Clark, and the Bankrupt Corporation. (Original Petition to Review is attached hereto and made part hereof.)

The questions presented for this Court to determine by the said Petition for the Sale, etc., and said Objections were as follows:

I.

Should the Trustee in Bankruptcy Be Authorized to Sell the Property Described in Said Petition, together with all minerals, oil, gas and other hydro-carbon [56] substances in, on or produced from said land, But Reserving and Excepting, However, unto Security-First National Bank of Los Angeles, and H. F. Metcalf, as Trus-

tee in Bankruptcy of the above entitled bankrupt estate, as their interests may appear, and to their assigns and successors, all rents, royalties and other things of value accruing pursuant to or by virtue of (and prior to the expiration, surrender or other termination thereof) that certain oil and gas lease dated January 14, 1938, and entered into by and between said Trustee in Bankruptcy and said Security-First National Bank of Los Angeles and others, as lessors, and the Universal Consolidated Oil Company, as lessee, and recorded in the office of the County Recorder of the County of Los Angeles, in Book 15515, Page 326, Official Records of said County; and subject to the following, to-wit:

- (a) All restrictions, reservations, easements and rights of way of record, if any.
- (b) The terms, conditions and provisions of that certain contract relating to said property and made and entered into by and between said Trustee in Bankruptcy, F. P. Newport Corporation, Ltd., Security-First National Bank of Los Angeles and Universal Consolidated Oil Company, as parties of the first part, and City of Long Beach, a municipal corporation, and its Board of Harbor Commissioners, as parties of the second part, copy of which contract is attached to and made a part of the petition filed in these proceedings by said Trustee in Bankruptcy, on the 12th day of December, 1940, and entitled "Petition for Order Authorizing H. F. Metcalf, as Trustee, to Execute Certain Agreements with the City of Long Beach, et al." [57]
- (c) The last half of 1947 and 1948 taxes.

II.

Was the Offer of \$198,000 Cash, Lawful Money of the United States Submitted by the Procter & Gamble Manufacturing Co. (Subject to the Conditions Hereinafter Noted) the Best Offer the Trustee in Bankruptcy Had Been Able to Obtain Therefor, and, Should the Sale Be Confirmed?

The conditions of said offer hereinbefore referred to are as follows:

- (a) That the said Trustee in Bankruptcy procure a letter addressed to the Procter & Gamble Manufacturing Co., and executed by the Universal Consolidated Oil Company, per its officers thereunto duly authorized, and in form approved by counsel for the Procter & Gamble Manufacturing Co., which letter shall, by its terms, grant permission to said purchaser to use a portion of the land as a baseball park and parking area, the land to be so used, being designated and described in map which is Trustee's Exhibit "1" in this proceeding.
- (b) That the Trustee in Bankruptcy shall cause to be removed, at the expense of this estate, all construction on that portion of the land outlined on said map hereinbefore mentioned, including, but without limiting the generality of the foregoing, all storage tanks, power poles, oil lines, sumps, steam lines and concrete walls (excepting the wall located on easterly boundary of said land).
- (c) That this Order Confirming and Approving this sale become final within Sixty (60) days from October 27, 1947, provided, however, that the purchaser may [58] waive this condition in its discretion.

This Court determined that the said property should be sold and that the offer so made was the best offer the Trustee in Bankruptcy had received, and that it was to the best interests of this estate that it be confirmed.

SUMMARY OF EVIDENCE

No transcript of the evidence offered and received by the Court has been prepared or submitted to the Referee. This summary is the best of the memory and recollection of the Referee.

This corporation was adjudicated a bankrupt on January 12, 1937. H. F. Metcalf was appointed Trustee in Bankruptcy on March 18, 1937, and duly qualified as such shortly thereafter.

Said Trustee in Bankruptcy has endeavored to sell the property hereinbefore mentioned ever since his qualification as such Trustee. On several occasions he advertised the property for sale in newspapers extensively, some of which newspapers include: Portland Oregonian, Chicago Tribune, Long Beach Reporter, Los Angeles Times, Los Angeles Examiner and Daily Shipping Guide, Los Angeles Daily Journal.

Said Trustee notified many business opportunity brokers and real estate brokers (whom he believed might have clients interested in the property) of his desire to sell the property Reserving his interest in the Universal Consolidated Oil Company lease. It was estimated that he notified 50 brokers in the Long Beach and Los Angeles area.

The offer made by the Procter & Gamble Manufacturing Co. as hereinbefore noted was the best firm offer received by the Trustee.

The said Trustee received an offer from a reliable contractor to perform the work required of the Trustee under the [59] terms of the offer of the Procter & Gamble Manufacturing Co. for an approximate total of \$20,-378.00.

The said property was appraised at \$211,462.00 by Thomas J. Cunningham (now a judge of the Los Angeles Superior Court) appointed by this Court to appraise the said property.

Security-First National Bank of Los Angeles has insisted and continues to insist on immediate liquidation of the properties of this estate and payment of the balance of the secured indebtedness due it.

Said Trustee in Bankruptcy is in default in payment of the indebtedness owing to said Bank as provided by the Agreement of January 12, 1937, supplement thereto and modifications thereof, which Agreement, supplement and modifications have been approved by the Honorable Paul J. McCormick by order of November 5, 1937.

Only the sum of \$46,232.20 has been received by said Bank since January 1, 1946, as the result of liquidation of the properties of this estate.

The creditors objecting to said sale represent about 70% in amount of the unsecured indebtedness of this estate.

Bank of America National Trust and Savings Association, a national banking association, in addition to being an unsecured creditor is also a secured creditor.

Mr. Higgins, Chief Valuation Engineer for Southern Pacific Company, called as a witness by the Objectors, testified: That in his opinion the property consisted of

approximately six acres, and was reasonably worth—exclusive of oil rights—\$60,000 an acre. On cross-examination, he admitted that he knew of no sale of similar property in the Long Beach Harbor area for a price in excess of \$30,000 an acre, and that, in 1944, Southern Pacific [60] Company had sold to the Procter & Gamble Manufacturing Co. 2.374 acres on Channel 2 for \$62,834.00, or approximately \$26,000 an acre. That in setting his value of \$60,000 per acre he had not considered the fact that only part of the surface of the land could be used until 1963 because of the oil wells on the property.

Mr. Johnson, who has had many years' experience in appraising lands in Southern California, called as a witness by the Objectors, testified: That the property had a fair market value of approximately \$391,000. On cross-examination he admitted that he had never appraised any water front or dock property in the Long Beach, Los Angeles or San Pedro areas before he appraised this property; that he knew of no sale of similar property in the Long Beach Harbor area for a price in excess of \$30,000 per acre. He admitted that he had read the Tom Mason report concerning this property and that he knew of no sales in the area in excess of the prices given in the said report. (The Tom Mason report is attached hereto and made part hereof.)

Mr. Meade, a geologist and a petroleum engineer, called as a witness by Objectors, testified: That in his opinion there were two undeveloped oil zones or horizons underlying this property, the Ford Zone and the 237 Zone; and that he believed wells could be drilled thereto and oil developed in commercial paying quantity. On cross-examination he admitted that the present Lessee, Universal

Consolidated Oil Company, had drilled a well into one of the said zones, to-wit, the Ford Zone, and had abandoned the well because it did not believe the well could be developed as a producer of oil in commercial paying quantity. He further testified that in his opinion the said well so drilled would have produced oil in commercial paying quantity if the Lessee had elected to [61] place it on production; and that, since Lessee had failed to run a production test, the determination of Lessee to abandon the well was not conclusive as to the productivity of said zone.

Mr. Carrey, a geologist and petroleum engineer of many years' experience (and the geologist and engineer who advised said Trustee under an Order of this Court relative to the operations of Lessee, Universal Consolidated Oil Company), testified, as a witness called by the Objectors, that in his opinion there were two undeveloped oil and gas zones underlying the said property, known as the Ford Zone and the 237 Zone; that he was not prepared to say whether or not oil could be produced from either of these zones by a well drilled on this particular property; that, in his opinion, the well drilled by said Lessee as hereinbefore mentioned, to the Ford Zone was not conclusive as to whether or not oil could be developed or produced from said zones or either of them in commercial paying quantity; that the well drilled by Universal Consolidated Oil Company into the Ford Zone was, in his opinion, drilled from the location on the property most likely to obtain production; and that, if the sale was made under said conditions, then the value of the landowners' royalty interest remaining in the Lessors would be lessened, since the sale contemplated the reservation only in the bankrupt estate of the Lessors' interest under the present

lease and, if the lease were abandoned, all right of the bankrupt estate in the minerals would cease.

Mr. Burgess, a real estate broker engaged in that business for many years in the Los Angeles area, testified: That in his opinion the property had a reasonable value of \$66,000 per acre. On cross-examination he admitted that he [62] knew of no sales of similar property in the area for a sum in excess of \$30,000 per acre.

Mr. Tom Mason. At a prior hearing in relation to a sale of this property, Mr. Mason submitted a written report of his findings regarding the value thereof and particularly listed sales in the area of similar property. The report has been previously mentioned in this summary. Mr. Mason, called as a witness for Security-First National Bank of Los Angeles, testified: That his said report contained a resume of all of the sales of real property with which he was familiar which occurred in the area; that he had again inspected this particular property; that, based on his knowledge of the property and of the sales in the area, it was his opinion the property had a reasonable value, exclusive of oil rights, of \$196,350.00; that he had been engaged as a real estate broker and had handled similar properties in the Long Beach, Wilmington and San Pedro area for more than twenty years; and that he had appraised properties in the area for various business concerns and the Courts for many years.

Mr. Follansbee, Vice President of the Universal Consolidated Oil Company, and a petroleum engineer familiar with the drilling of the well located on the property in question to the Ford Zone hereinbefore mentioned, called as a witness by the Trustee in Bankruptcy, testified: That

Universal Consolidated Oil Company had determined, after examining the electric log of the well and the cores, that oil and gas could not be produced therefrom in commercial paying quantities and had, therefore, elected to abandon the well for that zone; that they had spent many thousands of dollars in drilling the well to the zone; that, had they believed oil and gas could be produced from said well in [63] commercial paying quantity, they would have put the well on production; that the well was properly drilled; that there was no mechanical defect therein; and that, in his opinion, the 237 Zone did not underlie this property because there had been no production below the Ranger Zone on the side of the fault that this property is located.

Mr. Metcalf, Trustee in Bankruptcy, testified: That the said offer received from the Procter & Gamble Manufacturing Co. was the best firm offer he had been able to obtain and if it was this Court's desire that the property be liquidated promptly, he had no other prospect of obtaining a better offer; that he originally had placed an offering price on the property at a sum much in excess of the present selling price but had not been able to get a firm offer for any greater amount than this present one; that the property was badly eroded; and that to put the property in condition for use as a dock and warehouse it would be necessary to install a bulkhead and to fill in behind the bulkhead; and that this would cost in excess of \$50,000.00.

Mr. Russell Adams, assistant vice president of Security-First National Bank of Los Angeles, called as a witness by the said Bank, testified: That he had been in charge of this particular loan ever since the inception of the bankruptcy proceeding; that no substantial progress had

been made in the liquidation of the properties; that there was paid to the said Bank as a result of liquidation only the sum of \$46,232.20 since the first of the year 1946; that since the Trustee in Bankruptcy was in default under the terms of the Agreement of January 12, 1937, supplement thereto and modifications thereof, the said Bank would insist on a foreclosure of its loan unless the property was liquidated promptly and the Bank's loan was paid. [64]

It was testified that Mr. Joseph Sattler, a licensed real estate broker, had interested the Procter & Gamble Manufacturing Co. to submit a bid for the property. The Court concluded that, under the circumstances, Mr. Sattler was entitled to a reasonable brokerage fee which the Court determined to be \$5,000.

The Referee submits herewith the following:

1. Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Procter & Gamble Manufacturing Co., a corporation.
2. Objections to Said Petition.
3. Memorandum of Security-First National Bank of Los Angeles in Support of Petition.
4. Findings of Fact, Conclusions of Law and Order, authorizing said sale and confirming said sale.
5. Petition to Review Referee's Order.
6. All Exhibits offered and received in evidence.

Dated this 28 day of Jan., 1948.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Jan. 28, 1948. Edmund L. Smith, Clerk. [65]

[Minutes: Wednesday, March 11, 1948]

Present: The Honorable Charles C. Cavanah, District Judge.

For hearing (1) motion of Trustee for order affirming order of referee of Dec. 19, 1947, approving and confirming sale of certain real property to Procter & Gamble Mfg. Co.; (2) petition for review of Referee's order filed Dec. 19, 1947, by Dorothy Day, Martha McMillen, Matilda Olsen, Wm. H. Neblett, Mrs. F. P. Newport, Eugene P. Clark, and the bankrupt; L. M. Cahill, Esq., appearing as counsel for petitioners Dorothy Day, et al.; Edmund Nelson, Esq., appearing as counsel for Bank of America, Nat'l Trust & Savings Assoc., an unsecured creditor; Paul E. Iverson, Esq., appearing as counsel for Security-First Nat'l Bank of Los Angeles, a secured creditor; Allen T. Lynch, Esq., appearing as counsel for trustee; T. O. McCraney, Esq., appearing as counsel for Procter & Gamble Mfg. Co.; at 10:15 A. M. court convenes herein, and all counsel answering ready, Court orders hearing proceed.

Attorney Lynch makes a statement to the Court as to the matter before the Court. Attorney Cahill makes a statement to the Court and on his motion it is ordered that Attorney Edmund Nelson be associated with counsel for petitioners on review as counsel for petitioners.

Attorney Cahill makes a further statement to the Court and moves that the petitioners be allowed to call Mr. Metcalf, the trustee herein, to testify to matters occurring since the prior hearing before the referee re sale referred to in said petition for review.

Attorney Lynch makes a statement to the Court in answer to the Court's inquiry as to whether there are

any objections to the calling of the trustee to testify at this time, and states that there are no [66] objections thereto.

The Court makes a statement that the Court believes that it is the duty of the Court to hear further evidence as to developments since the referee confirmed the sale herein, and orders that the said trustee may be called to testify at this time, and thereupon,

H. F. Metcalf, the trustee herein, is called, sworn, and testifies on examination by Attorney Cahill, examination by the Court, and by further examination by Attorney Nelson.

Attorney Nelson makes a statement to the Court and moves that the sale be not confirmed.

And said Witness H. F. Metcalf testifies further on examination by Attorney Lynch. Attorney Lynch makes a statement to the Court of the nature of the property of the bankrupt and of the proposed sale to Procter & Gamble Mfg. Co.

Attorney Iverson makes a statement to the Court on behalf of the Security-First Nat'l Bank.

Attorney McCraney makes a statement to the Court on behalf of Procter & Gamble Mfg. Co.

H. F. Metcalf, the trustee, makes a further statement to the Court.

Attorney Cahill makes a further statement to the Court in support of objections to the confirmation of the sale.

At 11:50 A. M. court recesses herein until 2 P. M. today.

At 2:05 P. M. court reconvenes herein, and all being present as before, Court orders counsel proceed with the hearing.

Attorney Cahill continues with his statement and argues in support of the said petition for Review of the Referee's order confirming the sale, and refers to and reads from the reporter's transcript of the hearing before the referee.

At 3:15 P. M. court recesses. At 3:25 P. M. court reconvenes herein and all being present as before, the Court makes a statement and Attorney Cahill continues his argument in support of said Petition for Review.

At 3:35 P. M. Attorney Lynch makes a statement on behalf of the trustee; at 3:42 P. M. Attorney Iverson argues to the Court on behalf [67] of the Security-First Nat'l Bank.

At 3:51 P. M. Attorney McCraney makes a statement to the Court on behalf of Procter & Gamble Mfg. Co.

At 4 P. M. Attorney Cahill makes a further statement to the Court.

At 4:07 P. M. Attorney Lynch makes a further statement to the Court.

At 4:10 P. M. the Court makes a statement as to further proceedings herein, and directs counsel for the trustee to prepare and present form of written order postponing the ruling of the Court on this Petition for Review and for the consideration of any further bids that the trustee herein may submit for the property of the bankrupt, and the time for the ruling of the Court and the consideration of further bids submitted by the trustee is fixed for April 26, 1948, 10 A. M., before the Court. [68]

[Title of District Court and Cause]

ORDER RE REVIEW FROM REFEREE'S ORDER
OF DECEMBER 19, 1947

Heretofore and on March 11, 1948, at the hour of 10:00 A. M., there came on regularly for hearing before the Honorable Charles A. Cavanah, Judge of the above entitled court, pursuant to notice duly given as required by law, the motion of H. F. Metcalf, Trustee in Bankruptcy herein, for an order approving and confirming the Referee's order made and signed on the 19th day of December, 1947, confirming the sale of certain real property to Procter & Gamble Manufacturing Co., and the petition to review said order duly filed by and in behalf of Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene Clark, and the bankrupt corporation; Messrs. Bailie, Turner & Lake, by Allen T. Lynch, appearing as counsel for the Trustee in Bankruptcy, Paul E. Iverson, Esq., appearing as counsel for Security-First National Bank of Los Angeles, a secured creditor, L. M. Cahill, Esq., appearing as counsel for the reviewing parties, Edmund Nelson, Esq., appearing as co-counsel with L. M. Cahill for said reviewing parties, O'Melveny & Myers, by Thomas O. McCraney, appearing as counsel for Procter & [69] Gamble Manufacturing Co., and Joseph Sattler, real estate broker, appearing in pro per; and evidence having been offered and received for and in behalf of the reviewing parties, and the Court having considered said evidence

and the argument of counsel, and it being made to appear to the satisfaction of the Court that a confirmation and approval of the sale to Procter & Gamble Manufacturing Co. might be injurious and prejudicial to the best interests of the creditors of this estate in view of certain facts and circumstances that have arisen since the confirmation of the sale by the Referee; and good cause appearing, and no objection being made thereto;

It Is Ordered that said petition for review and the motion of the Trustee hereinbefore referred to be and they are hereby submitted, and April 26, 1948, at the hour of 10:00 A. M., is hereby fixed by the Court as the time for further consideration of said matter and the hearing of further argument thereon.

It Is Further Ordered that the Trustee in Bankruptcy may submit on said date any additional bids that he receives for said property prior to said time, and the Court will at said time consider any such bids so submitted, and then determine whether or not the interests of this estate and the creditors require the confirmation of any one of the bids so submitted or the confirmation and approval of the Referee's order hereinbefore mentioned.

Dated this 19th day of March, 1948.

CHARLES C. CAVANAH

Judge

[Endorsed]: Filed Mar. 19, 1948. Edmund L. Smith,
Clerk. [70]

[Title of District Court and Cause]

ORDER RE SUPPLEMENTAL CERTIFICATE
ON REVIEW

(Real Estate Commission of Joseph Sattler)

A Memorandum on behalf of Joseph Sattler's Real Estate Commission, on Review re Sale of Real Property, having been presented to the Court, and the Court having duly considered the same, now makes the following order in the above-entitled matter :

It Is Hereby Ordered that the Referee, H. L. Dickson, file a supplement to his Certificate on Review, setting forth the pertinent facts relating to the real estate commission of Joseph Sattler; and

It Is Further Ordered that Joseph Sattler will be heard concerning his claim on April 26, 1948, at 10 A. M., if he so desires.

Dated: Los Angeles, California, March 19, 1948.

CHARLES C. CAVANAH

U. S. District Judge

[Endorsed]: Filed Mar. 19, 1948. Edmund L. Smith,
Clerk. [71]

[Title of District Court and Cause]

SUPPLEMENTAL CERTIFICATE ON REVIEW

I, Hugh L. Dickson, the Referee to whom the above entitled matter was referred on March 1, 1945, hereby submit Supplemental Certificate on Review concerning the agreement to pay a real estate commission to Joseph Sattler.

This Bankruptcy was filed as an involuntary proceeding on March 19, 1935, and after a series of appeals, an Order of Adjudication was entered on January 12, 1937, and was referred to Referee Ernest R. Utley who continued to administer the estate until March 1, 1945, at which time the matter was transferred to me for further administration.

Shortly after the matter was referred to me, Joseph Sattler came into my office and told me that he had reason to believe that he could dispose of the two parcels of property in Long Beach which are now the subject of this Review.

I told Mr. Sattler, in view of the fact that this estate had been in bankruptcy approximately ten years, that I felt that something should be done toward liquidating the estate rather than continued operation, and I told him that if he could find a purchaser for this property, I would allow him a commission not to exceed \$5000.00.

Mr. Sattler immediately began to contact various persons with the view of disposing of this property and finally procured a buyer in the person of The Proctor & Gamble

Manufacturing Co., [72] who made an offer of \$198,000.00 for the purchase.

I announced in open court prior to the confirmation of this sale that I had agreed with Mr. Sattler to pay him a commission not to exceed \$5000.00 if he procured a buyer for this property, and this statement is borne out by a transcript of the proceedings of that date which is attached hereto.

In addition, I am attaching hereto a series of photostatic copies of letters written by Mr. Sattler to various persons in an effort to sell the property which is the subject of this Review.

In the long course of administration of this estate, many sales of real estate have been made and invariably a real estate commission has been paid without objection on the part of the Bankrupt, his Counsel, or any other person and it seems odd now that they take exception to my agreement to pay a commission to Mr. Sattler, which in fact is only about one-half of what he would be entitled to as a licensed real estate broker, which he is.

I have always had the view that the purpose and chief aim of bankruptcy proceeding was liquidation and not operation, and for that reason I sought to facilitate the liquidation of this estate by employing Mr. Sattler as a licensed real estate broker.

Respectfully submitted,

HUGH L. DICKSON

Referee in Bankruptcy

March 29, 1948. [73]

EXHIBIT "A"

1528 South Sycamore Avenue,
Los Angeles 35, California,
August 16th, 1945.

Mr. L. H. Wiggers,
Procter & Gamble,
Gwynne Building,
Cincinnati, Ohio.

Dear Sir:

In course of searching for a buyer for some land directly behind your plant at Long Beach, California, I have learned that your firm was seeking additional land.

You will kindly note on the enclosed photostat, two prices of property directly behind your plant named "Newport". One piece 250 ft. in width and another piece 500 ft. in width, both fronting on channel #3. On the smaller piece there are *tree* oil wells and on the larger piece six oil wells from which this estate receives an oil (landowners) royalty of over \$4000 a month. Both of these properties are in a bankrupt estate and the bankruptcy court is anxious to dispose of them in fee including the oil royalty. If you are interested, we believe the court would approve a very favorable price.

We hardly think in this Long Beach Harbor are there two such large frontages immediately available for purchase.

Awaiting your reply, I am

Yours sincerely,

Real Estate Broker License
#2362. [74]

EXHIBIT "B"

1528 South Sycamore Avenue,
Los Angeles 35, California,
August 16th, 1945.

Atchison, Topeka & Santa Fe Rwy. Co.
331 Central Building,
108 West Sixth Street,
Los Angeles, California.

Gentlemen:

You will kindly note on the enclosed photostat two pieces of property named "Newport" on channel #3. The 250 ft. piece directly adjoins the Southern Pacific property and has three oil wells on it. The other piece with a 500 ft. frontage on channel #3 has six oil wells on it. Both of these properties produce over \$4000.00 a month in land-owner's oil royalty. Both of these properties are in a bankrupt estate and the bankruptcy court is anxious to dispose of them in fee including the oil royalty. If you are interested, we believe the court would approve a very favorable price.

With the opening of the Panama Canal for coast to coast shipping, we hardly think in this Long Beach Harbor are there two such large frontages immediately available for purchase.

Hoping you can find these properties to be profitable to you, I am

Yours sincerely,

Real Estate Brokers License
#2362 [75]

EXHIBIT "C"

[Crest]

THE PROCTER & GAMBLE MANUFACTURING
CO.

Executive Offices

Cincinnati, 1, Ohio, U. S. A.
September 4, 1945

Mr. Joseph Sattler
1528 South Sycamore Ave.
Los Angeles 35, California

Dear Mr. Sattler:

Answering your letter of August 16, we might possibly have some interest in parcel fronting approximately 500 feet on 7th Street across from our Los Angeles plant. We should appreciate your advising the basis on which this property might be acquired.

Very truly yours,

W T. McWhorter
Insurance & Real Estate Department

WTM:JD

[Crest] P. O. Box 599

Cincinnati 1, O., U. S. A.

[U. S. Postage Stamp]

[Stamped]: Cincinnati Ohio Sep 4 1945

Mr. Joseph Sattler
1528 South Sycamore Ave.
Los Angeles 35, California [76]

EXHIBIT "D"

Copy 1528 South Sycamore
Los Angeles 35, California

Mr. W. T. McWhorter Sept. 8, 1945

Executive Offices

The Procter & Gamble Manufacturing Co.

P. O. Box 599

Cincinnati, Ohio

Dear Mr. McWhorter:

Answering your letter of September 4th in which you request being advised the basis on which the 500 foot parcel might be acquired, please be advised as follows:

1st. This estate is in bankruptcy.

2nd. It must be for cash.

3rd. The bid must be approved by the bankruptcy court.

Off the record, from my knowledge of the matter, there is an opportunity for you to get a good buy in this parcel of property. The court is desirous of liquidating this estate and a fair offer stands an excellent chance of meeting the approval of the creditors and the court. As to the values, I surmise you are familiar with them, but if you wish me to amplify the value point, I have made a check thereof and could pass the information on to you for consideration. The point to bear in mind is that the court and the creditors are willing to give you a good deal on an equitable basis.

On this particular piece there are six oil wells whose oil royalty returns are better than \$2500.00 a month. This particular piece contains six acres.

I will be happy to help in any manner for you to acquire this bargain.

Yours truly,

/s/ JOSEPH SATTLER [77]

EXHIBIT "E"

O'MELVENY & MYERS

433 South Spring Street

Los Angeles 13

* * * * *

October 1st, 1945

Cable Address "Moms"

In Reply Refer to

S-2720

Subject

Mr. Joseph Sattler

1528 South Sycamore Avenue

Los Angeles 35, California

Dear Mr. Sattler:

You recently wrote a letter to Mr. W. T. McWhorter of the Procter & Gamble Manufacturing Company regarding the property of the F. P. Newport Corporation, Limited, which is near their plant in Long Beach. I have been asked to contact you and discuss the matter further. I will be glad to talk it over with you in the near future.

Very truly yours,

John O'Melveny

O'Melveny & Myers

433 South Spring Street

Los Angeles 13, Calif.

[U. S. Postage Stamp]

[Stamped]: Los Angeles Calif. Oct 1 6:30 PM 1945

Mr. Joseph Sattler

1528 South Sycamore Avenue

Los Angeles 35, California [78]

EXHIBIT "F"

[Crest]

THE PROCTER & GAMBLE MANUFACTURING
CO.

Executive Offices

Cincinnati, 1, Ohio, U. S. A.

September 11, 1945

O'Melveny & Myers
433 South Spring Street
Los Angeles 13, California

For Mr. John O'Melveny

Gentlemen:

We are writing to you at the suggestion of our General Counsel, Mr. Frank F. Dinsmore to whom we are sending a copy of this letter. Will you please send him a copy of your answer.

We are enclosing a copy of a letter to Mr. L. H. Wiggers from Mr. Joseph Sattler, a real estate broker in your City, a copy of our letter to him of September 4th, and a copy of his answer of September 8th.

We are also enclosing the map which Mr. Sattler sent to us, on which you will notice opposite the property of this Company a six acre tract fronting 500 feet on West Seventh Street, marked "Newport".

We know nothing about Mr. Sattler other than these letters and do not wish to become involved to the extent of being required to pay him a commission in the event of a purchase by us. From other information that we have, we understand that H. F. Metcalf is the Trustee-in-Bankruptcy of F. P. Newport Corporation, Limited, and that Security-First National Bank of Los Angeles have some interest in the bankruptcy proceedings. We assume that these proceedings are in the Federal Court in your City.

Subject to your judgment in the matter, we would suggest that you communicate with Mr. Sattler, and without involving us in any compensation to him, if possible, find out what the facts are in reference to this property and what it could be acquired for, including the oil wells, which he says are returning a royalty of \$2500.00 a month.

Will you please let us hear from you at an early date, with a return of the attached map?

Very truly yours,

W. T. McWhorter

WTM:JD [79]

EXHIBIT "G"

1528 South Sycamore Avenue,
Los Angeles 35, California,
October 12th, 1945.

Mr. W. T. McWhorter,
The Proctor & Gamble Manufacturing Co.
Cincinnati, Ohio.

Dear Sir:

Recently I have had the pleasure of talking to Mr. John O'Melveny with reference to the 500 ft. piece of Newport property on Long Beach Channel. Previous to seeing Mr. O'Melveny I asked Judge Dickson, Referee in Bankruptcy in this matter, if he would be kind enough to informally discuss the sale of this property with Mr. O'Melveny. He, Judge Dickson, informed me that he would be delighted to discuss the subject with Mr. O'Melveny, and I so informed Mr. O'Melveny when I met him. This informal

bring
chat, it is my belief, will \wedge the viewpoint of both you and the court to an agreeable understanding.

I wish to thank you for the privilege you have *giving* me to help.

Yours sincerely,

EXHIBIT "H"

C. R. Pickering
Manager
Land Department

JERGENS OIL COMPANY

Producers of Petroleum

Jergins Trust Building

Telephone 7-1231

Long Beach 2, California

September 14, 1945

Joseph Sattler
1528 South Sycamore
Los Angeles, California

Dear Sir:

We note the notice in the Los Angeles Herald-Express of September 11, 1945, that certain properties are to be sold in the Long Beach Area.

We would appreciate it if you would send us a description of this property.

Yours very truly,

JERGENS OIL COMPANY

By C. R. Pickering

C. R. Pickering

EXHIBIT "I"

1528 South Sycamore Avenue,
Los Angeles 35, California,
September 18th, 1945.

Mr. Pickering,
Manager Land Department,
Jergins Trust Building,
Long Beach, California.

Dear Sir:

Enclosed is map which will identify the two parcels of property mentioned in the Herald-Express of September 11th. Circled in red, the numbers of the particular parcels are #16 and #18.

If these parcels should find any appeal to you, I would be glad to call on you.

Yours sincerely,

California Real Estate Broker License
#2362 [82]

EXHIBIT "J"

1528 South Sycamore Ave.
Los Angeles, California,
December 4th, 1945

Mr. W. T. McWhorter,
Executive Offices,
Proctor & Gamble,
Cincinnati, Ohio.

Dear Sir:

I have just been informed that the Los Angeles Soap Company have just raised the bid for the surface rights to the six acres that you are interested in to \$198,800.00 and have deposited a check for ten percent of this amount with the trustee.

Thanking you for your past courtesy, I am

Yours truly,

L. A. Soap Com
has raised to 198,800
W. T. McWhorter [83]

EXHIBIT "K"

1528 South Sycamore Ave.
Los Angeles, California,
December 28th, 1945

Mr. W. T. McWhorter,
Executive Offices,
Proctor & Gamble Manufacturing Company,
P. O. Box 599,
Cincinnati, Ohio.

Dear Sir:

On January 18th, 1946, the six acre parcel of land behind your property, fronting on the channel, is coming up for sale. At this sale, in the court room, you are privileged to bid for this property. If your bid is higher than the one submitted, your bid then becomes the buyer.

It is hard for me to express to you the value of this property, as you already own property there. Its use, its conveniences, especially rail facilities, now that the Santa Fe Railroad has entered Long Beach, is exceptional. I hardly believe, a piece this size so close to your plant is available with so many facilities for shipment already in.

My suggestion to you is to hop a plane and come out. Buy it first and under this occasion you are sure to buy it right. Wishing you a Happy New Year.

Yours truly

Telephone of above address,
WAlnut 5 8 5 6. [84]

EXHIBIT "L"

[Crest]

THE PROCTER & GAMBLE MANUFACTURING
CO.

Executive Offices

Cincinnati, 1, Ohio, U. S. A.

January 4, 1946

Mr. Joseph Sattler
1528 S. Sycamore Ave.
Los Angeles, Calif.

Dear Mr. Sattler:

This will acknowledge receipt of your letter of December 28.

We are not sure that our Company is still interested in this property but we are passing on the information you have given us to our Factory Management for consideration. We appreciate your calling this matter to our attention.

Yours very truly,

W. T. McWhorter

Insurance & Real Estate Department

WTM:IR

[Crest] P. O. Box 599
Cincinnati, O., U. S. A.

[U. S. Postage Stamp]

[Stamped]: Cincinnati Ohio Jan 4 1946

Mr. Joseph Sattler
1528 S. Sycamore Ave.
Los Angeles, Calif. [85]

EXHIBIT "M"

1528 South Sycamore Avenue,
Los Angeles, California,
January 8th, 1946.

Mr. W. T. McWhorter,
Executive Offices,
The Proctor & Gamble Manufacturing Co.
P. O. Box 599
Cincinnati, Ohio.

Dear Sir:

I am taking the liberty of sending an official notice to the creditors of the F. P. Newport Corporation Bankruptcy, notifying creditors of a sale of six acres of land at Long Beach Harbor, that you showed interest in to make an official bid.

Thanking you for your courtesy, I am

Yours truly,

Joseph Sattler [86]

EXHIBIT "N"

1528 South Sycamore Ave.
Los Angeles, California
February 7th, 1946

Mr. W. T. McWhorter,
The Procter & Gamble Manufacturing Co.
P. O. Box 599,
Cincinnati, Ohio.

Dear Sir:

Had your bid been in the court on the day of the sale, you would have successfully purchased the six acres in Long Beach. The Los Angeles Soap people at the very last moment withdrew their bid. The "view point" of the court is to liquidate this bankruptcy case. If your factory management committee would reconsider this situation you would be the owners of a very valuable piece of ground underpriced.

Your sincerely,

EXHIBIT "O"

Mutual 24-24
218 H. W. Hellman Bldg.
354 South Spring Street,
Los Angeles 13, California,
February 21st, 1947.

Mr. W. T. McWhorter,
Executive Offices,
The Procter & Gamble Manufacturing Co.
P. O. Box 599
Cincinnati, Ohio.

Dear Mr. McWhorter:

Would your Factory Management Committee give consideration again to the purchase of the six acres behind your Long Beach plant? It has been about a year since our last exchange of letters. Time may possibly have mellowed the view point of the committee. With a return of normal conditions it might be that the committee would look upon the purchase of the property with favor.

Would you be kind enough to again present the matter to them?

Yours very truly,

EXHIBIT "P"

[Crest]

THE PROCTER & GAMBLE MANUFACTURING
CO.

Executive Offices

Cincinnati, 1, Ohio, U. S. A.
February 24, 1947

Mr. Joseph Sattler
218 H. W. Hellman Bldg.
354 S. Spring Street
Los Angeles 13, Calif.

Dear Mr. Sattler:

Answering your letter of February 21, we see no reason for again referring this matter to our factory management committee for consideration. If there has been a material downward revision in price, it is possible that the factory management may want to reconsider the matter and in such an event, we should appreciate hearing further from you.

Yours very truly,

W. T. McWhorter
Insurance and Real Estate Department

[Crest] P. O. Box 599
Cincinnati, 1, Ohio, U. S. A.

[Stamped]: Cincinnati Ohio Feb 24 1947

Mr. Joseph Sattler
218 H. W. Hellman Bldg.
354 S. Spring St.
Los Angeles 13, Calif. [89]

EXHIBIT "Q"

224 H. W. Hellman Building,
354 South Spring Street,
Los Angeles 13, California,
February 28th, 1947.

Mr. W. T. McWhorter,
Executive Offices,
The Procter & Gamble Manufacturing Co.
P. O. Box 599,
Cincinnati, Ohio.

Dear Mr. McWhorter:

Answering your letter of February 24th, in the matter of a revision of price, the court hasn't any authority to make a revision of price.

What the court must have, before it, is a bid, just as you presented the bid before. Then the court holds a hearing, with all interested parties present, then acts. The bid is either accepted or rejected. This estate is in bankruptcy and the law rules the procedure.

Mr. McWhorter I am the real estate broker. When the fruit is ripe on the tree, everyone wants it, price no object. This piece of harbor land is still a seedling. Grow your own fruit and buy while the estate is desirous of selling. In this particular instance there is a bargain for you. In this particular instance the "view point" of the court is to liquidate this property.

To understand this "view point", the facts are that much of the entanglements of this particular bankruptcy have been liquidated. The indebtedness is now nominal in comparison with the original amount. There are other large parcels of property in this estate. The first large parcel that sells will have a [90] vital bearing in clearing up this bankruptcy. Should then this piece of harbor land revert to private ownership, the bid that you formerly presented for this piece, I hardly believe, would be considered for the three acre piece nearby.

Recently there has been discovered, nearby, a lower prolific oil sand. The present oil operators are willing to drill, providing the present royalty is reduced ten per cent for the lower sand. So far there has been no agreement. If in the near future some understanding should be made between the oil company and the estate, the price for this property, in private hands, might be quoted around a million dollars.

I again impress upon you, the "view point" of the court is to liquidate this estate out of bankruptcy. I would suggest the bid you made, heretofore, for possible favorable results.

Yours very truly,

[Endorsed]: Filed Mar. 29, 1948. Edmund L. Smith,
Clerk. [91]

[Minutes: Monday, April 26, 1948]

Present: The Honorable Charles C. Cavanah, District Judge.

For (1) consideration of any further bids received by the Trustee for the property of Bankrupt, pursuant to order, filed March 19, 1948; (2) ruling by the Court on Petition for Review of Referee's Order filed Dec. 19, 1947, by Dorothy Day, Martha McMillen, Matilda Olsen, Wm. H. Nebless, Mrs. F. P. Newport, Eugene P. Clark and the Bankrupt corporation, heretofore heard by the Court on March 11, 1948; L. M. Cahill, Esq., appearing as counsel for petitioners Dorothy Day, et al.; Mortimer Kline, Esq., appearing as counsel for B. B. Robinson, a prospective purchaser; Allen T. Lynch, Esq., appearing as counsel for Trustee:

Attorney Cahill requests a continuance of two weeks; Attorney Lynch states that the Trustee has not been able to obtain any higher bid; Attorney Mortimer Kline makes a statement re Proctor & Gamble Co. and asks for two weeks continuance; Attorney Cahill makes a statement; the Court makes a statement; and Attorney Lynch makes a statement and reads telegram from Paul Zifran.

H. F. Metcalf is called, sworn, and testifies.

Attorney McCraney, for Proctor & Gamble, makes a statement; Attorney Lynch makes a statement; the Court makes a statement and orders that order of sale of Referee is not confirmed but is reversed. [92]

[Title of District Court and Cause]

OBJECTIONS OF THE PROCTER & GAMBLE
MANUFACTURING CO. TO PROPOSED "OR-
DER VACATING AND SETTING ASIDE REF-
EREE'S ORDER OF DECEMBER 19, 1947, RE
SALE OF REAL PROPERTY TO PROCTER &
GAMBLE MANUFACTURING COMPANY"

To the Honorable C. C. Cavanah, Judge of the Above
Entitled Court:

In accordance with the rules of the District Court of the United States for the Southern District of California, Rule 7(a), Procter & Gamble Manufacturing Co. hereby files its objections to the proposed "Order Vacating and Setting Aside Referee's Order of December 19, 1947, re Sale of Real Property to Procter & Gamble Manufacturing Company".

1. Objects to the failure to make a recital, finding and/or conclusion:

(a) That the express purpose for which the continuance from March 11, 1948 to April 26, 1948, was granted was to [93] permit the Trustee to attempt to find a more favorable sale;

(b) That the Trustee was unable to obtain a more favorable sale, although he diligently attempted so to do;

(c) That there were no objections to the continuance for two weeks requested by the reviewing parties on April 26, 1948, and that counsel for the Trustee and counsel for The Procter & Gamble Manufacturing Co. expressly consented to the granting of said continuance.

2. Objects to the recital, finding, conclusion and/or order:

(a) At page 2, lines 8 to 15:

“that ‘—it being made to appear to the satisfaction of the Court that a confirmation and approval of the sale to the Procter & Gamble Manufacturing Company might be injurious and prejudicial to the best interests of the creditors of this Estate in view of certain facts and circumstances that have arisen since the confirmation of the sale by the referee.’”

(b) At page 3, lines 14 to 17:

“that the consideration offered by said Procter & Gamble Manufacturing Company for said real estate in the sum of \$198,000.00, less the cost of removing certain oil well equipment, was a totally inadequate price for said real estate;”

(c) At page 3, lines 17 to 21:

“that the terms and conditions imposed upon the Trustee and upon the within Estate, by said Company, as terms and conditions of said sale, were and are detrimental and injurious to the within Estate and to the [94] best interests of the creditors thereof;”

(d) At page 3, lines 21 to 24:

“that the Referee was acting beyond his jurisdiction in ordering the payment of said real estate broker’s commission, and that its payment under the circumstances shown would have been unauthorized, and contrary to law;”

(e) At page 3, lines 24 to 28:

“that many of the objections presented in writing to the Referee at the hearing before him were serious objections that should have been sustained by him, and that a confirmation of said sale should not have been made by the Referee herein.”

(f) At page 3, line 32, to page 4, line 5:

“Now, Therefore, It is Ordered, Adjudged and Decreed by the Court:

“That said Order of the Referee in Bankruptcy herein, dated December 19, 1947, confirming the sale of the real property described therein, to Procter and Gamble Manufacturing Company is reversed, vacated and set aside.”

Respectfully submitted,

O'MELVENY & MYERS

PIERCE WORKS

RICHARD C. BERGEN

HOWARD J. DEARDS

By Howard J. Deards

Attorneys for The Procter & Gamble
Manufacturing Co. [95]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 5, 1948. Edmund L. Smith,
Clerk. [96]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 25308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD., a corporation,

Bankrupt.

ORDER VACATING AND SETTING ASIDE REFEREE'S ORDER OF DECEMBER 19, 1947, RE SALE OF REAL PROPERTY TO PROCTER & GAMBLE MANUFACTURING COMPANY

Be It Remembered:

That on March 11, 1948, at the hour of ten o'clock A. M. there came on regularly for hearing before the above entitled Court, Honorable Charles C. Cavanah of the above entitled Court presiding, pursuant to notice duly given as required by law, the motion of H. F. Metcalf, Trustee in Bankruptcy herein, for an order approving and confirming the Referee's order made and filed on the 19th day of December, 1947, confirming the sale by said Trustee of certain real property to Procter & Gamble Manufacturing Company and the petition to review said order duly filed by and in behalf of Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, and the above named bankrupt corporation; at which time there appeared Bailie, Turner & Lake, by Allen T. Lynch, Esq., appearing as counsel for the Trustee in Bankruptcy; Paul E. Iverson, Esq., appearing as counsel for Security-First National Bank of Los Angeles, a secured creditor; L. M. Cahill, Esq., appearing as counsel for the Bankrupt and for said creditors petitioning for [97] review; Edmund Nelson, Esq., appearing as

co-counsel with L. M. Cahill for said reviewing parties; O'Melveny & Myers, by Thomas O. McCraney, Esq., appearing as counsel for Procter & Gamble Manufacturing Company; and Joseph Sattler, a real estate broker, appearing in pro per.; and evidence having been offered and received for and in behalf of the reviewing parties, and the Court having considered said evidence and the argument of counsel, thereafter made its Order that "—it being made to appear to the satisfaction of the Court that a confirmation and approval of the sale to the Procter & Gamble Manufacturing Company might be injurious and prejudicial to the best interests of the creditors of this Estate in view of certain facts and circumstances that have arisen since the confirmation of the sale by the Referee" and that it appearing to the Court that it would be necessary that the entire transcript of the testimony before the Referee be read by it, that said petition for review and said motion of the Trustee and the Trustee's request for further time to receive bids be given to him be submitted and the hour of ten o'clock A. M. April 26, 1948, be fixed by the Court as the time for further consideration of said matters and the hearing of further argument thereon; that thereafter and on April 26, 1948, at the hour of ten o'clock A. M., said petition and said motion came on regularly for hearing pursuant to said order of continuance before the above entitled Court, the Honorable Charles C. Cavanah, Judge of said Court, presiding, at which time there appeared Bailie, Turner & Lake, by Allen T. Lynch, Esq., appearing as counsel for the Trustee in Bankruptcy; Paul E. Iverson, Esq., appearing as counsel for Security-First National Bank of Los Angeles, a secured creditor; L. M. Cahill, Esq., appearing as counsel for the Bankrupt and for said creditors petitioning for review; Edmund Nelson, Esq., appearing as

co-counsel with L. M. Cahill for said reviewing parties; O'Melveny & Myers, by Thomas O. McCraney, Esq., and Richard Cheney Bergen, Esq., appearing as counsel for Procter & Gamble Manufacturing Company; and Joseph Sattler, a real estate broker, appearing in pro. per.; and an oral motion having [98] been made by the said L. M. Cahill, Esq., upon behalf of said reviewing parties for a two weeks continuance of said matters and said motion having been denied by the Court; and further evidence having been offered and received for and on behalf of said reviewing parties, and the Court having examined the said Petition to Review the Referee's Order and the Referee's certificate on Review, dated the 28th day of January, 1948, and the amendment thereto in reference to that part of the Referee's said Order which directed the payment of a real estate broker's commission to the said Joseph Sattler; and having examined the transcript of the record of the proceedings before the Referee in said matter, and having considered said certificate, said amendment and said transcript and all of said evidence and the argument of counsel; and it appearing to the satisfaction of the Court that the consideration offered by said Procter & Gamble Manufacturing Company for said real estate in the sum of \$198,000.00, less the cost of removing certain oil well equipment, and payment of other costs and if allowed the payment of the alleged commission was a totally inadequate price for said real estate; and that the terms and conditions imposed upon the Trustee and upon the within Estate, by said Company, as terms and conditions of said sale, were and are detrimental and injurious to the within Estate and to the best interests of the creditors thereof; and it further appearing that the Referee was acting beyond his jurisdiction in ordering the payment of said real estate broker's commission, and

that its payment under the circumstances shown would have been unauthorized, and contrary to law; and that many of the objections presented in writing to the Referee at the hearing before him were serious objections that should have been sustained by him, and that a confirmation of said sale should not have been made by the Referee herein, and being fully advised in the premises, the Court concludes, that the said Order of the Referee, so transferred to this Court for review, should be reversed, vacated and set aside;

Now, Therefore, It Is Ordered, Adjudged and Decreed by the [99] Court:

That said Order of the Referee in Bankruptcy herein, dated December 19, 1947, confirming the sale of the real property described therein, to Procter and Gamble Manufacturing Company is reversed, vacated and set aside.

May

Dated this 10th day of ~~April~~, 1948.

CHARLES C. CAVANAUGH

Judge of the United States District Court

Approved as to form: Bailie, Turner & Lake, by Allen T. Lynch, Counsel for the Trustee Herein. Paul E. Iverson, Counsel for Security-First National Bank of Los Angeles. Edmund Nelson, Co-counsel for Reviewing Parties. L. M. Cahill, Co-counsel for Reviewing Parties. O'Melveny & Myers, by, Counsel for Procter & Gamble Manufacturing Company.

Notation made in Bankruptcy Docket, pursuant Rule 79a F. R. C. P., on May 12, 1948.

Judgment entered May 12, 1948. Docketed May 12, 1948. Book 50. Page 627. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed May 12, 1948. Edmund L. Smith, Clerk. [100]

[Title of District Court and Cause]

NOTICE OF APPEAL OF PROCTER & GAMBLE
MANUFACTURING CO.

Notice Is Hereby Given that Procter & Gamble Manufacturing Co. hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain minute order reversing the Referee's order of December 19, 1947, made by the above entitled Court and entered April 26, 1948, and from that certain order of the above entitled Court entitled "Order Vacating and Setting Aside Referee's Order of December 19, 1947, Re Sale of Real Property to Procter & Gamble Manufacturing Company," signed May 10, 1948, filed May 12, 1948, and entered May 12, 1948, in Civil Order Book 50 at page 627, and from the whole of each of said orders.

O'MELVENY & MYERS
PIERCE WORKS
RICHARD C. BERGEN
HOWARD J. DEARDS

By Howard J. Deards

Attorneys for Procter & Gamble
Manufacturing Co. [101]

[Affidavit of Service by Mail.] [102]

[Endorsed]: Filed May 25, 1948. Edmund L. Smith,
Clerk. [103]

[Title of District Court and Cause]

ORDER AS TO ORIGINAL EXHIBITS

It appearing to the satisfaction of the Court that in the preparation of the record on appeal to the Circuit Court of Appeals for the Ninth Circuit pursuant to the Notice of Appeal filed herein on May 25, 1948, by appellant Procter & Gamble Manufacturing Co., the original exhibits filed with Referee's Certificate on Review on January 28, 1948, should be sent to the appellate court in lieu of copies thereof;

Now, Therefore, It Is Hereby Ordered that the Clerk of this Court in forwarding the record on the aforesaid appeal to the Circuit Court of Appeals for the Ninth Circuit shall send the original exhibits filed with Referee's Certificate on Review on January 28, 1948, in lieu of copies thereof.

Dated this 28th day of June, 1948.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Jun. 28, 1948. Edmund L. Smith, Clerk. [113]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 113, inclusive, contain full, true and correct copies of Creditors' Involuntary Petition in Bankruptcy; Adjudication and Order of Reference; a portion of Minute Order Entered February 28, 1945; Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Procter & Gamble Manufacturing Co.; Objections of Creditors and of the Bankrupt to Proposed Sale of Real Property; Objections of Ruby E. Neblett to Proposed Sale of Property of Bankrupt to Procter & Gamble Company; Memorandum in Support of Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Procter & Gamble Manufacturing Company; Findings of Fact, Conclusions of Law and Order of Referee; Petition to Review Referee's Order; Referee's Certificate on Review; Minute Order Entered March 11, 1948; Order re Review from Referee's Order; Order re Supplemental Certificate on Review; Supplemental Certificate on Review; Minute Order Entered April 26, 1948; Objections of the Procter & Gamble Manufacturing Co. to Proposed Order Vacating and Setting Aside Referee's Order of December 19, 1947, re Sale of Real Property to Procter & Gamble Manufacturing Company; Notice of Appeal of Procter & Gamble Manufacturing Co.; Statement

of Points on Which Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal and Order re Original Exhibits, which, together with copy of reporter's transcript of proceedings on November 13, 24 and 26 and December 1, 1947; December 1, 1947; March 11, 1948, and April 26, 1948, and Original Exhibits filed January 28, 1948, with Referee's Certificate on Review, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$28.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30 day of June, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Before Hon. Hugh L. Dickson, Referee in Bankruptcy

REPORTER'S TRANSCRIPT

Los Angeles, Calif.

November 13, 1947

Appearances:

For the Trustee: Bailie, Turner & Lake, by Allen T. Lynch, Esq.

For Security First National Bank: Paul E. Iverson, Esq.

For Certain Creditors and the Bankrupt: Lawrence M. Cahill, Esq.

Los Angeles, California, Thursday, November 13, 1947.

10:00 A. M.

Mr. Lynch: The Trustee is ready, your Honor, but there are numerous objections to the sale which have been filed, consequently it is going to take us some time to hear this matter. Counsel for the Security-First National Bank has suggested that they would like the matter continued for one week. As far as the Trustee is concerned, we have no objection.

The Referee: If it is going to take all day I will put it on a non-calendar day.

Mr. Lynch: It will probably take at least a day.

Mr. Cahill: It will.

Mr. Lynch: I understand that Mr. Nelson is here and the bank objects to the sale.

Mr. Nelson: Yes.

The Referee: No one is in favor of it?

Mr. Iverson: Yes, they are. The Security-First National Bank is in favor of it.

Mr. Cahill: In support of the objections filed on behalf of a number of creditors represented by my office, and on behalf of the bankrupt, I have one witness here who is being transferred to the Southern Pacific Company offices from here to San Francisco shortly. He will reside there permanently and will be unable to return [2*] at the continued hearing. I wonder if it would be possible to put him on the stand and take testimony from him with regard to the value of the property.

The Referee: Let's have him.

Mr. Cahill: Mr. Higgins, will you come forward, please.

HARRY C. HIGGINS,

called as a witness on behalf of the Objector, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cahill:

Q. What is your full name?

A. Harry C. Higgins.

Q. What is your business or occupation?

A. Up to the first of this month, I have been Land Appraiser for the Southern Pacific Company—since 1922.

Q. You are now being transferred?

A. I am now transferred to San Francisco to take over the land and appraising of the entire Southern Pacific Company.

Q. As Evaluation Engineer?

A. Engineer and Land Evaluation will be my title. [3]

Q. Have you had experience in appraising water front property? A. Yes, I have.

(Testimony of Harry C. Higgins)

Q. Starting when, in what year?

A. Since 1922, with the Southern Pacific, I have appraised over a hundred million dollars worth of property, including water front lands at San Francisco, Oakland, Alameda, Portland, San Pedro and Long Beach.

Q. Prior to that, have you appraised similar lands for other companies?

A. Six years prior to that I was Land Appraiser for the A.T.S.F. Railway Company. My appraisals for that work covered about twenty million dollars, including water front lands at San Diego, San Francisco, Oakland, Richmond and Stockton.

Q. Are you familiar with the Newport lands on the channel of the harbor, Mr. Higgins?

A. Yes, I am, Mr. Cahill.

Q. Are you particularly familiar with the six acre parcel? A. Yes, sir.

Q. Does the Southern Pacific own adjacent and adjoining lands? A. Yes, they do.

Q. What acreage adjoining?

A. The Southern Pacific owns 31.86 acres now. [4]

Q. Have you recently had an opportunity for your company to appraise the 31 acres?

A. Yes, in fact I appraised that property before the Southern Pacific purchased it in 1924. It had been my duty to constantly keep abreast of all sales, development and leases at that point.

Q. Have you made an appraisal of the lands of the Trustee in Bankruptcy of the F. P. Newport Corporation?

A. Yes.

(Testimony of Harry C. Higgins)

Q. When did you make that?

A. I made that January 30, 1946.

Q. Was that reduced to a written appraisal? In other words, did you prepare a written report on it?

A. Yes, I did.

Q. Is that the report you have in your hand, Mr. Higgins? A. It is a copy.

Q. The original was delivered to the bankrupt?

A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. Have you had occasion since that date to check your figures and arrive at a new appraisal?

A. Yes, I have.

Q. Will you state first what your appraisal was [5] as of the date stated by you?

Mr. Iverson: I think that is irrelevant, if the Court please.

The Referee: What is the date?

Mr. Cahill: January 30, 1946.

Mr. Iverson: We are talking about today, not January 30, 1946.

The Referee: I sit in the middle on experts. Some say \$100,000.00 and some say millions, so I am not overawed by either side. All right, what was the date?

The Witness: January 30, 1946 it was \$359,436.00.

By Mr. Cahill:

Q. That was for the six acre parcel?

A. Well. Mr. Cahill, I am very technical. My figure is 5.9906.

Q. Just a trifle under six acres? A. Yes.

Q. Have you had occasion since that date to re-evaluate the property? A. Yes, I have.

(Testimony of Harry C. Higgins)

Q. Have you arrived at an opinion of a new appraisal?

A. Well, Mr. Cahill, I did not change that figure as of the present time.

Q. You believe the value is the same?

A. I still believe it to be worth the figure I [6] put on there January 30, 1946.

Q. Now, as to the 31 acres of the Southern Pacific Company, is that now being offered for sale?

A. No, the Southern Pacific land has been taken off the market, and will be until such time as the revenue from the oil has been reduced or diminished.

Q. Have you had occasion to appraise that 31 acres for your company recently? A. Oh, yes.

Q. Will you state the appraisal.

The Referee: Is it adjacent to this property?

Mr. Cahill: He has so testified.

The Referee: On the water front?

Mr. Lynch: May we know where?

By Mr. Cahill:

Q. Mr. Higgins, do you have an aerial photograph with you? A. Yes.

Q. Will you hand it to the Court, please?

A. Yes.

Q. Will you point out the Newport properties on the aerial photograph?

A. This is the Newport property and this is the Southern Pacific (indicating).

The Referee: Talk out loud, Mr. Higgins. The reporter would like to hear this. Don't whisper to me. [7]

A. All right.

(Testimony of Harry C. Higgins)

Q. When you say this, what are you pointing to?

A. The Southern Pacific property is in that particular peninsula which juts out into Long Beach Harbor. The Newport property is immediately adjoining on Channel No. 3. I believe that is to the south (indicating).

Q. You say the Southern Pacific property is not for sale?

A. Not as long as oil is producing a revenue.

The Referee: All right, proceed.

By Mr. Cahill:

Q. The question was as to the evaluation you have made.

Mr. Iverson: May I see that document?

The Witness: The date on the back shows when the picture was taken.

By Mr. Cahill:

Q. Will you state the evaluation you placed on the Southern Pacific Company's land, Mr. Higgins? Was it on an acre basis? A. Yes, it was.

Q. How much per acre?

A. I put \$60,000.00 per acre on the same land.

Q. That was how recently?

A. That was about six months ago. [8]

Q. Do you still believe that that is the figure?

A. I would like to qualify that. \$60,000.00 an acre is for surface rights, only for industrial purposes.

Q. It does not include the minerals?

A. No.

Q. Do you regard the value of the lands of your company for water front purposes equal, less or superior

(Testimony of Harry C. Higgins)

—let us say superior to those of the subject lands, this six acres of the Newport Corporation?

A. I would say they are the same.

Q. Approximately the same value?

A. Same value.

Mr. Cahill: That is all.

The Referee: Any further questions?

Mr. Lynch: Yes, Your Honor.

Cross Examination

By Mr. Lynch:

Q. Mr. Higgins, in appraising this six acre parcel, or approximately six acres, did you take into consideration the oil rights on that property?

A. No, I didn't.

Q. You did not split your appraisal and give so much to the oil rights on the property and so much to the surface rights? [9]

A. No, I didn't.

Q. So your appraisal of \$359,436.00 takes with it all of the oil rights and the surface rights; it is all of the rights of the property?

A. It is surface rights only for industrial purposes. It does not include minerals.

Q. You did not give any evaluation then to the oil rights?

A. No, I didn't.

Q. Or the minerals underground?

A. No, not as separate.

Q. The \$359,000 does not include that?

A. No, it doesn't include the oil.

Mr. Lynch: That is all.

(Testimony of Harry C. Higgins)

Cross Examination

By Mr. Iverson:

Q. Do you know of any recent sales of property down there, Mr. Higgins?

A. Well, every sale that has taken place in the last twenty-five years on that particular location.

Q. What is the most recent sale near the F. P. Newport property?

A. The most recent sale of water front land has been Patton Blinn to Spreckles.

Q. Where is that located? [10]

A. (No answer by the witness.)

By the Referee:

Q. When was the sale made to them?

A. Patton Blinn sold that property to Spreckles in March, 1946. That is located on the northerly side of Channel 2 of the Long Beach Harbor. It contained 37.328 acres.

By Mr. Iverson:

Q. Where is the F. P. Newport property from this property?

A. Right there (indicating).

Q. What was the sale price of this Patton Blinn property? A. It is a complicated affair.

By the Referee:

Q. What was it in dollars and cents without the complications?

A. The total amount paid for the value of the land was \$1,210,000.00 for 37.328 acres which gives you a result of seventy-four cents per square foot.

(Testimony of Harry C. Higgins)

Q. What is that per acre, have you figured it out?

A. \$32,415 per acre.

Q. That is about half of the value you put on the other isn't it?

A. Yes, it is, Your Honor, and it is a deeper [11] piece of property. It has a depth of more than 1400 feet. In our experience, or in my experience, I should say, with water front land, we do not carry water front value back farther than 500 feet.

By Mr. Iverson:

Q. What other recent sales have there been in that area?

A. That is the only recent sale I have in the Long Beach Harbor of water front land. There are other sales that don't cover water front land at all, but they are close to this area. It happens to be the Santa Fe property. The Santa Fe bought 4.47 acres.

Q. Where is the Santa Fe property?

A. The Santa Fe property is to the east of Channel No. 2.

Q. How far away from the Newport property is it?

A. It is 400 feet from the water front.

Q. It is not water front property, then?

A. It is not water front property.

Q. Do you know when the most recent sale other than Patton Blinn sale of property of water front nature was made in this area?

A. Oh, I think the last sale that was made there was perhaps the sale that the Southern Pacific sold to Proctor and Gamble. [12]

(Testimony of Harry C. Higgins)

Q. How long ago was that?

A. That was in 1936, the last sale made to Procter and Gamble by the Southern Pacific Company.

Q. Where was that property located?

A. That was located on the southerly side of Channel No. 2.

Q. How many acres? A. 2.3711 acres.

Q. What was the price?

A. The price was \$62,834 or \$26,500 per acre.

Q. What other sales have been made in that area within the last ten or fifteen years?

A. Well, Mr. Breslin sold a piece of property on the south side of Channel No. 2, which only had 150 foot frontage on the channel and extended back to a depth of 521 feet to Seventh Street. That was \$50,000 per acre.

Q. How long ago was that sale made?

A. That was about 1931.

Q. To whom did he sell it?

A. I think Breslin bought it, I am sorry about that. Breslin purchased the property at the time, G. P. Breslin.

Q. From whom did he purchase it?

A. About 1931.

Q. From whom, do you know?

A. Well, the Los Angeles Dock and Terminal. [13]

Q. How much did you say the price was?

The Referee: \$26,500.00 per acre; total price \$62,834.00 for 2.3711 acres.

The Witness: That is not the piece he is asking about now, Your Honor.

The Referee: That is Procter and Gamble, I beg your pardon.

(Testimony of Harry C. Higgins)

The Witness: That is the parcel the Southern Pacific Company sold to Proctor and Gamble.

The Referee: What was the price that Breslin paid?

The Witness: Breslin paid \$40,000 for that 150 feet.

The Referee: Anything further?

Mr. Iverson: That is all, Your Honor.

Mr. Lynch: One or two more questions.

The Referee: All right.

Recross Examination

By Mr. Lynch:

Q. Mr. Higgins, in appraising this particular parcel, did you take into consideration the fact that the surface use was limited by virtue of the fact it was covered with derricks and oil equipment and could not be used for approximately twenty years?

A. No, I didn't. [14]

Q. You assumed in making your evaluation, that the surface could be used without interruption?

A. Yes, I did.

Mr. Lynch: That is all.

Mr. Cahill: May I ask a few questions, Your Honor?

The Referee: Yes, but first let's inquire. You say twenty years. I understood that lease expired in 1953.

Mr. Cahill: It is 1963, I think.

The Referee: I see.

Redirect Examination

By Mr. Cahill:

Q. What part or portion of the Patten Blinn sale do you regard as not water front property?

A. If you will notice the map, Mr. Cahill, on that particular property there is a Pacific Electric right of

(Testimony of Harry C. Higgins)

way extending in a southwesterly direction and paralleling Channel No. 2 at a distance of about 500 feet from the channel. Only that portion between the Pacific Electric right of way and channel No. 2 is considered as water front land.

Q. What is the division in percentages, approximately?

A. You mean the area? [15]

Q. Yes. Is it half and half or one third and two thirds? Just what is it, Mr. Higgins?

A. I have got it here, 417,500 square feet, almost ten acres.

Q. That is not water front property?

A. No. That is water front.

Q. I said water front property.

A. I misunderstood the question. The rear portion is 791,000 square feet that is not considered water front land.

Q. The approximate value in your opinion, of the lands that are not water front lands, per acre is how much?

A. Sixty cents per square foot.

Q. The non-water front property?

A. The non-water front property at sixty cents per square foot.

Q. Do you recall the channel frontage of the Patton Blinn parcel in lineal feet?

A. The Patten Blinn piece that was sold to Spreckles has a frontage of—I am sorry, Mr. Cahill, but I don't have that particular feature of it. My estimate is that

(Testimony of Harry C. Higgins)

it is about 1500 feet, just from the map. I don't have a scale with me.

Mr. Cahill: Thank you, Mr. Higgins. I have no objection to a continuance, now, Your Honor. [16]

Mr. Lynch: May we have this photograph of the property, Mr. Higgins?

The Witness: Well that happens to be the property of the Southern Pacific Company.

The Referee: Wouldn't you lend it to us?

The Witness: You can get copies of it from the Pence Photo Company.

Mr. Lynch: Will you do that and we will pay for it. Now I would like to direct the Court's attention to the piece of property designated as Parcel No. 11, the one testified about, and call your attention to the water frontage on that particular piece of property. If the Court will note the neighboring property, there has been heavy erosion on it and we have very little water frontage as compared with the other.

The Referee: Will you be good enough to have a copy made of this and send us the bill? Mail it to me, if you wish. Any other questions, gentlemen?

Mr. Lynch: That is all. What about the 21st, a week from tomorrow?

Mr. Cahill: That is satisfactory.

The Referee: Very well, the matter is continued to November 21 at 10:00 o'clock in the morning. [17]

Los Angeles, California, Monday, November 24, 1947,
10:00 A. M.

The Referee: You may proceed.

Mr. Lynch: The Trustee in Bankruptcy in this matter offers for sale that portion of the Rancho Los Cerritos, in the City of Long Beach, described as follows:

“Beginning at the most Southeasterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577, Page 105 of Deeds, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed, North 19 degrees 42' 30" East 738.08 feet; thence North 64 degrees 42' 30" East 500 feet; thence South 19 degrees 42' 30" West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South 64 degrees 42' 30" West 500 feet to the point of beginning.”

The Trustee has an offer for this property in the sum of \$198,000, subject, however, to the following conditions:

That said Trustee vest in the company good title to the said land, free of all claims, liens, encumbrances, conditions, restrictions, reservations, easements and rights of way, except that certain oil and gas lease hereinafter mentioned and except such matters as may be approved by the Company, and that you provide the Company [20] with a title policy in the principal amount of \$180,000, evidencing a good title as aforesaid.

At this point, Mr. Bergen represents the bidder. And may I ask Mr. Bergen at this time, is it your understanding that the Company—meaning Procter & Gamble Company—will approve the restrictions and rights of way of record?

Mr. Bergen: That is right.

Mr. Lynch: Reserving and excepting to said Referee in Bankruptcy all rents, royalties, and other things of value accruing pursuant to and prior to the expiration, surrender, or other termination of that certain oil and gas lease dated January 14, 1938, by and between said Trustee in Bankruptcy and others, as lessors, and the Universal Consolidated Oil Company, as lessee, and recorded in the office of the County Recorder of the County of Los Angeles, in Book 15515, Page 326, Official Records, subject, however, to Trustee's obligation to pay all taxes relating to oil, gas, or hydrocarbon substances in, on, or under said land prior to the expiration, surrender, or other termination of said lease.

That said Trustee in Bankruptcy procure a letter addressed to the Company and executed by the proper officials of the Universal Consolidated Oil Company, in a form approved by counsel for the Company and granting permission to the Company to use that portion of said land outlined on the map attached hereto as Exhibit A, as a [21] baseball park and a parking area.

That said Trustee in Bankruptcy pay all costs and expenses of every kind and nature pertaining to the removal of all obstructions on that portion of said land outlined on the map attached hereto, including, but without limiting the generality of the foregoing, all storage tanks, power poles, oil lines, sumps, steam lines and concrete walls, excepting the wall located upon the easterly border of said land.

That said Trustee in Bankruptcy pay all commissions relating to this transaction.

Said sale to be consummated and final order approving sale within sixty days from October 27, 1947.

Is there anyone interested in bidding on this property?
(No response.)

H. F. METCALF,

Trustee, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lynch:

Q. You are the Trustee in Bankruptcy in this matter?

A. Yes.

Q. Are you familiar with the property referred to?

A. Yes.

Q. Do you have the map which was referred to as Exhibit A and attached to the letter from the Procter & [22] Gamble Company? A. Yes, I do.

Mr. Lynch: We offer the map as Trustee's first in order.

The Referee: That will be Exhibit 1 for the Trustee, Trustee's Exhibit 1. We will mark that Trustee's number 1, the map.

(Whereupon the map referred to was marked Trustee's Exhibit 1.)

Q. Mr. Metcalf, I show you three letters, one dated September 9, 1947, addressed to you as Trustee, and signed O'Melveny & Myers, by Richard C. Bergen.

Is that the letter you received in connection with this offer on or about the date it bears? A. Yes.

Q. I show you a letter dated October 15, 1947, addressed to yourself and signed by O'Melveny & Myers, per John O'Melveny.

Is that the letter, is that another letter you received on or about the date it bears, in relation to an offer?

A. Yes.

(Testimony of H. F. Metcalf)

Q. And I show you another letter dated October 28, 1947, addressed to myself, but a copy of which went to you. Did you receive a copy of that letter?

A. Yes. [23]

Q. Signed Richard C. Bergen? A. Yes.

Mr. Lynch: While counsel is examining these letters, Mr. Bergen, who represents Procter & Gamble, will stipulate that Procter & Gamble is to take the property subject to such rights as the City of Long Beach may have under its contract relating to the drilling sight obtained by the City, on which they have one well drilling under Channel 3.

Mr. Bergen: That is correct.

By Mr. Lynch:

Q. Did you obtain a statement in writing as to the approximate cost of doing the work that is referred to in the letter? A. Yes.

Q. Do you have that with you? A. Yes.

Q. May I see it? A. Yes.

Q. You have shown me a letter from the Winter Construction Company, signed by Brook Hawkins, Vice President, dated November 12, 1947; and another letter, under the same date, addressed to you, to which reference is made in the letter of November 12, 1947.

A. The second letter is an itemized statement of those things they propose to do. They are set forth there [24] in itemized form.

Q. This letter was received from Winter Construction Company on or about the date it bears? A. Yes.

(Testimony of H. F. Metcalf)

Q. The total offer to do the work referred to is \$20,378.00?

A. That, they tell me, is the maximum price. They hope to save some money on it.

Mr. Lynch: As Trustee's Exhibit Number 2, the three letters received from O'Melveny & Myers, dated September 9, 1947, October 15, 1947, and October 28, 1947, respectively as one exhibit, those contain the offer of the Procter & Gamble Company.

The Referee: Trustee's number 2.

(Whereupon the documents referred to were marked Trustee's Exhibit 2.)

Mr. Lynch: While counsel is examining that I might go to the fact that this property was appraised by an appraiser appointed by the Court, Thomas J. Cunningham, incidentally, now a Superior Court judge, in the sum of \$211,462.00, exclusive of all oil rights.

Mr. Cahill: Will you give us the date?

Mr. Lynch: My copy does not show the date.

The Referee: As I recall it, approximately a year ago, for Los Angeles Soap Company, about December, 1945, or January, 1946. [25]

Mr. Iverson: What was that figure, again?

Mr. Lynch: \$211,462.00. The Trustee asks that that appraisal be made a part of the record.

The Referee: I know I appointed Mr. Cunningham after considerable inquiry.

Mr. Cahill: I have in my file written objections of creditors to that sale, filed January 8, 1947. That will indicate the approximate date.

The Referee: I am sure it was in 1946.

(Testimony of H. F. Metcalf)

Mr. Cahill: It will be approximately two years next January.

Mr. Lynch: I think the actual appraisal was made in December, 1945. May it be understood that is part of the record?

The Referee: That will be admitted by reference, yes.

Mr. Hess: Was any appraisal made of the oil rights separately?

Mr. Lynch: No.

Mr. Hess: And no appraisal of the oil rights of the existing lease?

Mr. Lynch: No.

The Trustee offers the letter dated November 12, 1947, as Exhibit 3, together with the papers attached thereto. The Trustee now recommends the approval of the sale.

Mr. Cahill: Your Honor is advised written objections have been filed in my office on behalf of certain creditors [26] of the bankrupt.

Mr. Lynch: The burden of proof is on the parties objecting.

Mr. Nelson: I would like to ask for a stipulation that the Bank of America may rely on the written objections filed by Mr. Cahill.

The Referee: You want to join in with them?

Mr. Nelson: Without filing separate objections.

Mr. Lynch: I have no objection.

Mr. Cahill: Has Your Honor had an opportunity to read the objections I filed?

The Referee: Yes.

Mr. Cahill: That will eliminate the need of a statement on my part. And I will endeavor to proceed now to

(Testimony of H. F. Metcalf)

place before the Referee and before the Court evidence in support of those objections.

The Court: All right.

Mr. Cahill: I assume it will be stipulated by all parties concerned that the testimony given by Mr. Higgins on the day this matter was first called—

The Referee: Last Tuesday.

Mr. Cahill: The testimony given by Mr. Higgins will be considered testimony in support of the objections.

Mr. Lynch: Yes. Is he still here?

Mr. Cahill: No.

Mr. Lynch: Will counsel stipulate the articles set [27] forth in the Press-Telegram, of March 24th, 1946, relating to the sale of the Spreckels' property, concerning which Mr. Higgins testified, may be admitted in evidence for what it is worth, purporting to set forth facts and figures.

I am asking if you will stipulate.

The Referee: The newspaper article will be received in evidence.

(Whereupon the paper referred to was received in evidence as Trustee's Exhibit 4.)

Mr. Lynch: Will it be stipulated that a notice of the hearing of this matter was published in the Los Angeles Daily Journal, November 17 and November 19, and I will produce a copy of that notice that was in the Los Angeles Journal.

Mr. Hess: I do not care to stipulate.

Mr. Lynch: This is the one of this particular hearing, November 17-19.

(Testimony of H. F. Metcalf)

Mr. Hess: The hearing was on the 21st, on a four-day notice?

Mr. Lynch: Yes.

Mr. Hess: If the notice is offered for the purpose of indicating that the property itself has been offered for sale and this is the first notice of any public offering for sale, I would object on the ground the notice is not a reasonable one in time.

Mr. Lynch: The effect of it is a matter of argument. [28] There is no requirement of a publication of notice. I simply ask that counsel stipulate that such a notice was published on November 17 and November 19.

Mr. Hess: I will stipulate that notice was so published.

Mr. Cahill: I have no objection to stipulating that notice was published.

The Referee: It was widely publicized last year at the expense of the Los Angeles Soap Company, at approximately \$1000.00.

Mr. Cahill: I do not want to stipulate it is a notice of sale. I doubt if it is, legally.

Mr. Lynch: We do it under the Referee's ruling that a notice of hearing of these matters should be given in the papers.

Mr. Cahill: What is that date?

Mr. Lynch: November 17th and 19th.

Mr. Iverson: What was the date of the Long Beach Press-Telegram?

The Referee: March 14, 1946, Thursday, March 14, 1946, it shows here.

Mr. Cahill: In stipulating that newspaper article be admitted, we have reserved the right to show by evidence if there are any errors in there.

(Testimony of H. F. Metcalf)

The Referee: Certainly.

Have you had any other offers from any other source [29] for the purchase of this property since we had it up for sale, in 1946?

The Witness: Yes, I had, I have had a great many applications for it.

The Referee: What do you mean by that?

The Witness: People want to know, brokers want to know what it could be had for. I have discussed it with probably five or six, who claim they had active prospects for it, and when I told them the price at which they would have to bid, they withdrew.

The Referee: What price did you tell them?

The Witness: I told them we had an offer of \$198,000 that was good and definite, all cash; but that offer required the movement of certain fills from the property which would cost us a considerable sum of money. I told them, I said, "If you will make an offer and guarantee that amount, an offer somewhat less might be acceptable." And they withdrew.

I had one broker who came and who wanted to buy the surface rights. But after examination they found they couldn't get access, they couldn't put the buildings on that they wanted on the lot in order to justify the price they paid.

They came to me and said if I could close well No. 6, which is in the middle of the six acres, they would make a definite offer. [30]

I went to the oil company and asked Mr. Starr, the president, what he would charge to close well No. 6. And after considerable maneuvering he said \$32,500, to him. And I couldn't see it was a proper offer at all.

(Testimony of H. F. Metcalf)

Mr. Lynch: While the burden is on these parties objecting, I have no objection to going ahead at this time to have Mr. Metcalf point out what efforts he has made on this sale.

By Mr. Lynch:

Q. Did you list this property with any brokers?

A. Yes, I listed it with everyone in Long Beach that I could get hold of. I sent out folders to five hundred brokers in Long Beach. I advertised, offered the property in this district, in the Long Beach Press-Telegram on a number of occasions. The last one was about six or eight months ago, possibly more, and I spent about \$75.00 on that. And I got a great many calls.

Q. Did you list the property with others, that is, among others did you list it with Mr. Tom Mason?

A. I discussed it very freely with Tom Mason on many occasions.

Q. Who is Mr. Mason?

A. He is an appraiser and real estate broker, in the City of Los Angeles, whom I have known for many years.

Q. Does he specialize in business properties?

A. I understand that he does. [31]

Q. Industrial properties? A. Yes.

Q. In the Long Beach-Wilmington Area?

A. Yes.

Q. You did have an offer for this property from the Copra Oil & Meal Company Ltd., in 1945?

A. Who?

Q. Copra Oil & Meal Company, commonly referred to as the L.A. Soap Company. A. Yes.

Q. And that offer was in the sum of how much?

A. \$198,800, as I recall it.

(Testimony of H. F. Metcalf)

Q. And prior to that offer did you advertise this property for sale?

A. I believe I did.

Q. Did you advertise it in the Portland Oregonian?

A. I advertised it in the San Francisco Chronicle, I think the Seattle Post-Intelligencer.

Q. I show you what purports to be a statement made up by you of the cost of advertising, listing the dates, and so forth. Is that a statement made by you?

A. That is correct.

Q. Just subsequent to the time that the advertising was done? A. That is correct.

Q. In connection with the reimbursement of the costs [32] of that advertising by the Copra Oil & Meal Company— A. That is right.

Q. Can you state what advertising you did at that time?

A. The Portland-Oregonian and the Chicago Tribune.

Q. What dates, please.

A. The first was January 11th to the 15th, 1945. No, that is January, 1946. Chicago Tribune, January 10-14; Long Beach Reporter five days, January 11th, 15th, 18th, 22nd, and 25th; and the Los Angeles Times, January 8th, 9th, and 10th. The Los Angeles Examiner January 9th to the 13th, inclusive; and the Daily Shopping Guide five days, in January, 1946. The aggregate cost of that was \$640.80.

Q. That offer you obtained from the Copra Oil & Meal Company was withdrawn?

A. Their attorney, Mr. Dockweiler, I got it, giving as his reason they couldn't get their buildings, they couldn't adapt themselves to the lot.

(Testimony of H. F. Metcalf)

Q. An order was made in this court to permit a withdrawal—in other words, that the estate be reimbursed for that advertising?

A. So I understand.

Q. That was reimbursed?

A. I understand that it was. It did not come through my office. There is an appraisal charge of Thomas Cunningham has been made. [33]

Q. That particular appraisal charge was not paid by the Copra Oil, the \$640.80 was reimbursed, isn't that correct?

A. That I do not know.

Mr. Lynch: Will counsel stipulate it was?

Mr. Cahill: I will so stipulate.

Mr. Lynch: That is all.

Cross Examination

By Mr. Cahill:

Q. These dates you have read off of advertising in various newspapers were for what year?

A. 1946.

Q. All in 1946?

A. Yes, they were practically in January.

Q. Of that year?

A. Of that year.

Q. What advertising and in what newspapers have you had, in 1947, in reference to the proposed sale?

A. This proposed sale?

Q. Yes.

(Testimony of H. F. Metcalf)

A. None in regard to this proposed sale. In the Long Beach Press-Telegram I advertised for about a week or ten days. And as a result of that I got some calls; and as a possible result of that I have two offers in my pocket now. I got them this morning, by the way, which may come before his Honor later. [34]

Q. When was that advertising done in the Long Beach paper?

A. I guess six or eight months ago.

Q. In the year 1947? A. That is right.

Q. Is that advertising in the Long Beach paper you mentioned the only advertising that was done in reference to this property, in 1947?

A. It is all that I know of.

Q. You say you did get some results from that advertising? A. I said so.

Q. These offers you say you have in your pocket, when were they received?

A. This morning; I got them when I came to the office. I have been talking to Mr. Cahill for weeks. I had an offer here which he recently sent back and said, "I am unable to submit this offer, you must raise it."

The same thing happened with Procter & Gamble. He sent the offer and the check back and told them he couldn't submit it to the court with propriety. And I have an offer in my pocket of the oil rights on the 35 or 36 scattered lots, for the oil alone; and an offer of oil and property

(Testimony of H. F. Metcalf)

combined. I have been trading on that for nearly a month. I am trying to eliminate these crazy offers, to start with. They start trying to steal something. [35]

Q. These oil rights you refer to are on another property?
A. Yes.

Q. The lots are entirely different?

A. Entirely different from this; in no way comparable.

Q. The offers you received this morning are on what properties?

A. About 36 scattered lots under community oil lease, to the Bankline Oil Company.

Q. Neither of those offers are in reference to this six acres?

A. No, and they are not before his Honor yet. I am not trading with them. I think I can get a little better price.

Mr. Cahill: I would like to withdraw Mr. Metcalf. He just happened to be on the stand, and I propose to call him later. I have an order I would like to follow.

The Referee: All right.

Mr. Lynch: Will counsel stipulate that on Friday, at which time this matter was set for hearing, there was a public announcement made in the courtroom for a continuance of the hearing until this date?

Mr. Cahill: I was not there, but I understand it was made.

(Witness excused.) [36]

H. V. JOHNSON,

a witness produced by and on behalf of the Objector,
after being duly sworn, testified as follows:

Direct Examination

By Mr. Cahill:

Q. State your name, please.

A. H. V. Johnson.

Q. Where do you live?

A. I live at 2301 Ronda Vista Drive, and with my office at 437 South Hill Street.

Q. How long have you lived in Los Angeles County?

A. It will be 25 years this coming July.

Q. What is your business or occupation?

A. Appraiser.

Q. How long have you been so engaged?

A. All the time since I have been here, and about one third of the time for ten years, previous to coming here, in Denver, as an appraiser, for the State Insurance Adjuster.

Q. Is that a public official, a state official, in Denver?

A. Yes.

Q. Before coming here you were about three years an appraiser for that state official?

A. About ten years. I did that work outside of my regular work. [37]

Q. Your first employment in Los Angeles, important employment, was with whom?

A. My first important employment in the appraising profession in Los Angeles was with the Security-First National Bank.

Q. Of Los Angeles?

A. That is right.

(Testimony of H. V. Johnson)

Q. Security-First National Bank of Los Angeles?

A. Yes.

Q. In what capacity?

A. I did the appraisal for them in connection with the acquirement of the First National Bank, at that time, from around 25 to 28 bank buildings they purchased from the First National, that came in in that merger.

Q. How long were you engaged in that appraisal?

A. About ten or eleven months, I think.

Q. These were buildings scattered all over the City of Los Angeles, bank buildings?

A. And all over the city of Pasadena and various parts of the county—Montebello and Huntington Beach and Long Beach and Pasadena, and other places.

Q. Following that, what was your next activity in reference to appraisals?

A. I was employed just before that job was completed by the Production Building and Loan Association, as their chief appraiser. [38]

Q. Whose offices are where?

A. They have sold the company. I was with them six and a half years. The company has been merged with another company, on the death of its president, Mr. Moreland.

Q. Their offices were in Los Angeles?

A. Yes, at 523 South Spring Street.

Q. You were their chief appraiser for five years?

A. Six and a half years.

Q. Was that a building and loan association?

A. A building loan—no “and” in the word—“Building Loan Association.”

(Testimony of H. V. Johnson)

Q. Was that one of the state licensed institutions under the building loan law? A. It was.

Q. During the period of six and a half years you were so employed did you engage in other appraisals?

A. Excepting some special court work from time to time and the supervision of a couple of very fine residences that were being attempted to be built by the individuals upon which the Prudential had loaned money for their construction.

Q. Your employment following that six and a half year period was by whom?

A. About two or three years, independent appraisal work.

Q. For whom did you appraise during that time? [39]

A. Various individuals, and during that time I appraised five or six building and loan associations for the State Building and Loan Commissioner of California.

Q. Who was the commissioner at that time, do you recall his name?

A. No, I don't know his name.

Q. Mr. Joe Wilson was commissioner for quite a time. A. I don't remember.

Q. You don't recall the name of the commissioner, but you did appraise those complete building and loan associations?

A. I think it was five I appraised.

Q. And their assets in dollars were approximately what?

A. I would say around 50 or 60 million dollars.

Q. Where were their properties located?

A. All over the state, and some in Arizona, some in Nevada.

(Testimony of H. V. Johnson)

Q. And were they all real estate?

A. Yes, it was all real estate.

Q. Included therein were what types and classes of real estate?

A. There were many farms, some mountain ranches, some desert lands, some orange and other citrus groves, some business buildings, such as stores, hotels, apartment houses; and I believe there was one herd of white faced [40] cattle in that.

Q. How long were you so engaged?

A. I believe that was three and a half to four years.

Q. While you were doing that were you appraising for other institutions or companies?

A. Only by call. I was employed specially in certain cases for various banks, various lending institutions, to do certain appraising where there was possibly a questionable doubt with respect to the appraisal that had been turned in by the regular appraiser.

Q. Following that activity, the appraisal of building and loan associations, what was your next employment?

A. I was employed by the Title Guarantee and Trust Company as their chief appraiser.

Q. The Title Guarantee and Trust Company?

A. Yes.

Q. Its offices were where?

A. At the corner of 5th and Hill.

Q. How long were you so engaged?

A. About eleven years.

Q. That ended about what year?

A. I believe January three years ago, when they consolidated with the T. I., may be four years ago.

(Testimony of H. V. Johnson)

Q. That was over an eleven-year period?

A. Yes. [41]

Q. During that eleven years as chief appraiser for that company what type of property did you appraise?

A. Various types, consisting of residential properties on which they were lending money. The style of the company that was operated by the Fish Brothers, I don't remember that name—

Q. Was it the American Mortgage Company?

A. The American Mortgage Company. The Title Guarantee and Trust Company were trustees appointed by the court. And it was my duty to appraise those properties before the court would permit the sale, when they were liquidating the company.

And various orange groves, mountain lands, irrigation and water rights, checked the possibility of irrigation, the possibility of drilling wells upon dry land that they acquired through foreclosure; the cost of drilling these wells, and the machinery, the casing, and the electrical power to operate them, and so forth; to determine whether it would be profitable or not to irrigate certain land.

Q. Where were those operations located?

A. Between here and San Bernardino; one being the Norman Emplar property, and another north of Chino. They were located in Los Angeles County.

Q. Did you at that time appraise for others than the Title Guarantee and Trust Company?

A. Yes, in the last five or six years, I did work [42] for others, a few places, with permission—

(Testimony of H. V. Johnson)

Q. Name some of the other companies or institutions you appraised for during that period.

A. During that time I did considerable appraising free lancing, for individuals buying properties and selling. I did work for factories, such as the Emsco Company, the State Oil, the Hallett Manufacturing Company; and I did work for the Trustee of the Los Angeles Transit Corporation, which required a great portion of my time for two years. I started that job two years ago last May.

I believe there are still a few receiverships yet to appraise.

Q. You are testifying as to activities following the eleven-year period with the Title Mortgage Company?

A. Yes, the Transit Company is more recent. During this time I have appraised for many individuals, and seven months of that time I was, a portion of the time, I was in the FHA office. In fact, I was employed as the Chief FHA appraiser of the State of California, and helped to open this office and the other 59 offices in the state. After two months of employment with the FHA I was made Director of Personnel. And I qualified the various help at the other 59 offices in the state.

Q. This L.A. Transit, what kind of appraisal is that, appraisal of what?

A. It was an appraisal of all the land and various [43] properties that they owned that they disposed of after having purchased the company. They had much surplus land, running into many millions of dollars, 10 or 15 million dollars.

Mr. Lynch: I am willing to stipulate this witness has had wide and varied experience as an appraiser and generally qualified as an appraiser. I would be interested

(Testimony of H. V. Johnson)

in knowing whether or not he had actually appraised any property similar to the property here. Has he appraised any water front property?

The Referee: He has got all around it. Let's get him down in the oil well property.

Q. In this long period of appraisal you have testified appraising plants and factories. Have you appraised industrial properties, land or buildings? A. I have.

Q. Where?

A. In Long Beach, Inglewood, three or four in Los Angeles, one in San Bernardino.

Q. Have you had occasion to appraise during the war any airplane factories?

A. Since the war I will say I appraised the Ryan Plant, for the government, at San Diego.

Q. What is the full name of that?

A. Just the Ryan Plant.

Q. It is an airplane factory? [44]

A. Yes, it is.

Q. Is it a large industrial property?

A. Very large.

Q. Is that on the water front? A. Yes.

Q. You appraised both the land and buildings there?

A. Yes.

Q. For the United States Government?

A. Yes.

Q. When?

A. That was done in January, February, and March of 1946.

Q. You were engaged over that period of three months in doing that work? A. Yes.

(Testimony of H. V. Johnson)

Q. What has been your experience in industrial properties in the Los Angeles Industrial area?

A. I assisted in the appraisal of the Lockheed Plant at Burbank, the first of the year 1946.

Q. For whom? A. For the government.

Q. For the United States Government?

A. Yes.

Q. How long were you so engaged?

A. That was sandwiched in with the Ryan Plant. I put January, February, and March doing the Ryan Plant; and [45] so I helped, too, on Lockheed at Burbank.

Q. Industrial work, any industrial plants you have made appraisals of?

A. I believe I have named most of them, such as the Emsco, Allied Manufacturing, and Crescent Tool Company.

Q. Emsco is located at Long Beach? A. Yes.

Q. What is the size of that plant and grounds?

A. Around \$600,000. You mean in value?

Q. Yes. A. Around \$600,000.

Q. What acreage?

A. Approximately 23 acres, as I recall it.

Q. The other plants you have named, I am familiar with Emsco. You named Allied Manufacturing?

A. Allied Manufacturing, at Inglewood, consisted of about ten acres and buildings thereon. The Crescent Tool, it would be two acres, I believe; and the State Oil, I think that is about 10 or 11 acres.

Q. Where is that located?

A. That is at 23rd Street, I believe, that is where Washington and 23rd intersects. It is just almost south of Sears Roebuck.

(Testimony of H. V. Johnson)

Q. Are you familiar with the location of the Newport lands and Channel 3? A. Yes. [46]

Q. When did you see them first? A. January.

Mr. Lynch: May I ask a question before you go into this?

Mr. Cahill: Yes.

Mr. Lynch: Have you ever appraised any property on the water front of Long Beach and Los Angeles?

The Witness: None except the Newport property.

By Mr. Cahill:

Q. What was the date you named you first saw the Newport lands? A. January, 1946.

Q. Did you have occasion to make an appraisal at that time? A. Yes.

Q. And what portion of the Newport lands—there are two parcels, six acres and three acres. A. Yes.

Q. Did you appraise both parcels at that time?

A. No, I just appraised the six-acre parcel, not quite six acres, 5.9906, I believe.

Q. What was your appraisal? A. \$391,000.

Q. Have you had occasion since to examine the same property, the six-acre parcel? A. Yes.

Q. When did you make that examination? [47]

A. It was two weeks ago today, whatever date that would be.

Q. That is close enough. Was that for the purpose of making a re-appraisal? A. It was.

Q. Did you make a re-appraisal? A. Yes.

Q. What is your present opinion as to the fair market value of that six-acre parcel? A. \$419,571.00.

(Testimony of H. V. Johnson)

Q. Mr. Johnson, will you state what investigation you made in reference to these two appraisals? In other words, what facts did you obtain?

A. When I made the first appraisal I checked the Mason Report, which was at hand at that time, dated October 30, 1945.

Q. That was the report made by whom?

A. Thomas F. Mason.

Q. To whom?

A. To Mr. Metcalf, Trustee in Bankruptcy, *E. P. Newport Estate*, dated October 30, 1945.

Q. What was that report in reference to?

A. It is in reference to the value of the Newport property and it also sets forth 22 sales of property in the immediate neighborhood, that is, immediately adjacent to or near the Newport property. [48]

Q. You say you examined that report? A. Yes.

Q. What else did you examine?

A. I examined the property, the subject property particularly, and the oil wells thereon; and other sales of property in the immediate neighborhood. I examined the location of the wells on the Newport property, and the possibility of constructing a wharf thereon; also I checked the harbor report with respect to the depth of the various slips and channels; and the mean depth of low tide for larger vessels; oil, lumber, fishing, and so forth; the average widths of sheds in the harbor district; the widths of loading platforms and their construction, some having cement sea walls or retaining walls, and others constructed of empty piling; the number of feet of undeveloped land and the number of feet of developed land and for what purpose; the freight and passenger

(Testimony of H. V. Johnson)

loading for lumber and petroleum, fishing, miscellaneous; the kind of decks, such as timber, concrete, reinforced concrete, and piling decks; the total of municipal and of privately owned; the number of private wharves that are of concrete construction; the number of transit sheds owned by the City of Los Angeles; and the combined length of one-story and the two-story sheds; the general cargo terminal facilities since 1915, for various years; and the rank of this port report to others in the United States; and its relativity as an oil [49] port; the number of barrels shipped per year; the value of the oil shipments, and so forth; and also the accessibility of the subject property with respect to its location to the channel and also on the north side the Pacific Electric Railway running parallel to the northern boundary; and the possibility of constructing a warehouse and storage building, with an opportunity of putting in a spur from the present P.E. line on the street in front of the property immediate to and adjacent to all ships so that loading of freight could be handled directly from the ship to freight train and vice versa without duplication of loading.

Q. Was that conception of a warehouse that could be built with the present wells on the property?

A. Yes. I also prepared a map showing how it could be built, permitting this spur trackage immediately adjacent to the warehouse, and that would come immediately up to the warehouse and also leaving the property around the wells open for ingress and egress, and allowing the full 90 feet instead of allowing the required 15 feet; I allowed 25 by 90 for the laying down of roads. However, I understand they have developed a machine where that would be handled on. But I have laid out a plan where that could be handled just the same.

(Testimony of H. V. Johnson)

Q. Mr. Johnson, going to your qualifications, I neglected to ask you if you ever appraised an oil company?

[50] A. Yes, I have.

Q. Which one?

A. The Wilshire Oil Company I have appraised twice.

Q. Properties located where?

A. In Long Beach and out towards Santa Monica, and various places and various properties located in this vicinity.

Q. Was any industrial property in this appraisal?

A. Yes, I think there were perhaps 150 or 200 acres, all told, various spots, various lots, various improvements, oil tanks, and so forth.

Q. Do they have a refinery?

A. No, the refinery was moved to their Norwalk plant.

Q. You did not appraise their refinery?

A. I did not.

Q. Was that in dollars, just approximately, if you recall the appraisal?

A. It was many million, seven, eight, or ten million dollars, the property I appraised for them.

Q. In making this appraisal on the six acres, did you take into consideration sales of adjacent property?

A. Yes, I did.

Q. Were you present in this courtroom on the days when Mr. Higgins testified? A. I was.

Q. Do you recall he testified with reference to a [51] sale made, known as now the Spreckels' property?

A. Yes.

Q. Are you familiar with that property?

A. I have viewed the property recently; in fact, two weeks ago today.

(Testimony of H. V. Johnson)

Q. You have the record of sale there? A. Yes.

Q. Is that comparable property, in your opinion, to the Newport property?

A. In many respects it is, yes.

Q. Is it comparable as to the acreage?

A. It has 31.86 acres.

Q. And the Spreckels' parcel?

A. 35.688 acres of the Spreckels property; 31.86 is incorrect.

Q. What part of that 35 acres plus is water front property?

Mr. Lynch: It might facilitate the hearing and it would be a convenience to me if we used the map that is attached to Mr. Cunningham's appraisal. It shows that property and the other property.

Q. Yes. I am handing you the map which Mr. Lynch has just handed me and which he has taken from the report of Mr. Cunningham, appraisal report—

Mr. Cahill: Is that correct, Mr. Lynch?

Mr. Lynch: Yes. [52]

By Mr. Cahill:

Q. Do you find thereon the lands now referred to commonly as the Spreckels' purchase?

A. I believe that is the Patten and Davies Lumber Company. Let me see if I can find Spreckels' land here.

Mr. Cahill: It will be stipulated, Mr. Lynch, where the words "Patten and Davies Lumber Company" appear, that is one of the parcels that has been acquired by the Spreckels interest.

Mr. Lynch: Yes.

(Testimony of H. V. Johnson)

By Mr. Cahill:

Q. Did your investigation disclose Spreckels owned more than one parcel?

A. Patten-Blinn Lumber Company to J. D. and A. D. Spreckels, Pacific Electric Railroad Company to J. D. and A. D. Spreckels and General Petroleum.

Q. And the acreage?

A. The acreage, Patten-Blinn Lumber Company, 35.688 acres; and the Pacific Electric Railway Company transferred 1.66 acres; and the General Petroleum to J. D. Spreckels—I have oil rights—3.73 acres. I am not certain that is the exact amount of acreage or not, but that is the oil rights.

Q. I show you this map which, I think should be marked some way—

Mr. Cahill: Do you want to put this in as a Trustee's [53] Exhibit?

Mr. Lynch: Yes, I would just as soon.

The Referee. That will be number 5.

(Whereupon the document referred to was marked Trustee's Exhibit 5.)

By Mr. Cahill:

Q. Showing you Trustee's Exhibit 5 I will ask you if you find thereon the parcel acquired by the Spreckels interest from the Pacific Electric Railway Company.

A. Yes.

Q. Upon this map where the words appear "Patten and Davies Lumber Company," what is the parcel immediately adjacent thereto?

A. The Pacific Electric Railway Company parcel is immediately adjacent to the Patten-Davies Lumber Company parcel.

(Testimony of H. V. Johnson)

Q. That contains, according to your investigation of the acreage, what land?

A. The Pacific Electric Railway Company parcel is 1.66 acres, according to my records.

Q. Mr. Johnson, in making your appraisal, either the one of the \$391,000 or the one at \$419,000, did you appraise and include therein the oil rights?

A. No, I did not.

Q. Just before the recess I was questioning you as to the total of the Spreckels' purchase, as to what [54] portion of that, in your opinion, was water front property. Before you answer that question let me ask you this question: In your opinion, is the entire six acres water front property, the Newport property?

A. Yes, it is.

Q. In making the appraisal of the six acres did you segregate it in any way to arrive at the value?

A. Yes, I allowed 200 feet deep by 500 feet dockage frontage, as water front property; and appraise the rest of it at what might be called back land.

Q. You then treated the 500 foot frontage in the six acre parcel to a depth of 200 feet, as being strictly water front property? A. Yes.

Q. What appraisal did you put on that?

A. \$600 a front foot, or \$300,000.

Q. The land beyond that out to Seventh Street, what appraisal did you put on that? A. \$119,571.00.

Q. And upon what basis?

A. A dollar and fifty cents per square foot, upon 79,714 square feet of useable land for wharf purposes.

Q. And the second parcel, a piece of land 500 feet by what depth? A. 200 feet.

(Testimony of H. V. Johnson)

Q. You testified parcel number one— [55]

A. This other is irregular because of the fact that I made a map showing what square footage might be used for building outside of that reserved for the oil wells.

Q. Is it a larger or smaller piece than the 200 by 500, insofar as square footage is concerned?

A. I have not computed those separately.

Q. I will ask you that question at another time.

The Referee. Let me understand. You appraised the 500-foot depth, 200 feet, at \$600 a foot?

A. Front foot.

The Referee: Making \$300,000?

The Witness: Yes.

The Referee: The next item, what was the value you put on that?

The Witness: The next valuation was 79,714 square feet, at \$1.50 per square foot, or \$119,571.00.

The Referee: That makes \$419,000.00.

The Witness: That is correct.

The Referee: That is all.

Cross Examination

By Mr. Lynch:

Q. Mr. Johnson, did you examine the oil and gas lease that was made and entered into between the Trustee and others and the Universal Consolidated Oil and Gas Compnay?

A. No, I don't have a record of it.

Q. You never examined that to ascertain what [56] limitations upon the use of the surface rights of this property there were, did you?

(Testimony of H. V. Johnson)

A. No, I didn't. I have the report on the Long Beach Dock & Terminal Corporation; to whom that was made I was not informed, because the leases are not yet signed. I doubt if that applies to the one that you just asked about.

Q. I will state it does not. You testified on direct examination that one of the things you examined in order to ascertain or determine what appraisal to give to this property was the Thomas F. Mason report, made to Mr. Metcalf. I show you a copy of that report made by Mr. Mason to Mr. Metcalf, and ask you if that is the report to which you referred. A. It is.

Q. You have a copy of that report in your possession?

A. Yes, I do.

Q. Do you, by any chance, have the signed copy?

A. I don't know whether it is a signed copy or not. I will have to check for that.

Mr. Lynch: Yes, he has a signed copy. We will offer in evidence the signed copy that Mr. Johnson has in his possession.

Mr. Cahill: No objection.

The Referee: That is Trustee's number 7.

(Whereupon the document referred to was marked Trustee's [57] Exhibit 7.)

The Court: We will take a recess to 2:00 o'clock.

(Whereupon a recess was taken to 2:00 o'clock p.m.) [58]

Los Angeles, California, Monday, November 24, 1947,
2:00 P. M.

The Referee: You may proceed.

H. V. JOHNSON,

called as a witness by and on behalf of the Objector,
having been previously duly sworn, resumed the stand
and testified further as follows:

Cross-Examination (Continued)

By Mr. Lynch:

Q. Mr. Johnson, what did the Spreckels property sell
for, do you know?

A. The Spreckels property sold on March 11, 1946,
for \$925,000, cash.

Q. \$925,000 cash? A. Yes.

Q. That property has how much footage along Chan-
nel No. 2? A. With your permission I will—

Q. I don't care what map you use.

A. According to this map, it has 1391.67 feet of water
footage on Channel 2.

Q. That property also has a concrete bulkhead, does
it not? A. Yes, it does.

Q. Showing you this aerial photograph—

Mr. Lynch: The Trustee offers this aerial photograph
as next in order. [59]

The Referee: That will be Trustee's 8.

(Whereupon the photograph referred to was marked
Trustee's Exhibit 8.)

(Testimony of H. V. Johnson)

By Mr. Lynch:

Q. Showing you Trustee's Exhibit 8, which is an aerial photograph, will you with your pencil mark what is known as the Spreckels property, if you can locate it.

A. Here (indicating).

Q. Will you locate on that same aerial photograph the Newport property?

A. Here (indicating), as near as I am able to determine it. It would be that one right there (indicating).

Q. That Newport property is adjacent to the property which is known as the Southern Pacific property?

A. Yes.

Q. The Southern Pacific property has a concrete bulkhead or sea wall?

A. Yes.

Q. The Newport property does not?

A. Right.

Q. The aerial photograph shows heavier erosion on the Newport property?

A. Yes.

Q. Do you know how much area is now left in that property that is not under water? [60]

A. I have not computed that.

Q. As a matter of fact, there is exactly 1.63 acres that has been eroded and is under water?

A. In comparison to the rest of the land, I would accept that as approximately correct.

Q. Approximately 4.36 acres under water in that one parcel?

A. That looks like it would be about right.

(Testimony of H. V. Johnson)

Q. Now, Mr. Johnson, do you know, have you any idea what a sea wall or bulkhead would cost along that property?

A. Not without figuring it. But it would cost around \$22.00 a cubic yard for concrete work, forms, and so forth.

However, I am not trying to argue with you, Mr. Lynch. But I do not think a sea wall would be the practical thing. I think piling, if used—

Q. I call your attention to what has been along the Southern Pacific property. What has been there?

A. That is where the sea wall has been built.

Q. Along Channel 3 there is a sea wall, so far as the subject property is concerned?

A. That is correct.

Q. And that is also true as to Channel 2 on the Spreckels property?

A. Yes. [61]

Q. In other words, there has been built in that area and along the frontage of a great portion of the property on both Channel 2 and Channel 3 what we refer to as a bulkhead or sea wall?

A. That is correct.

Q. So that assuming the people who built those there have adopted a good practice in the industry, you would say sea walls are a common thing in that area?

A. They are a common thing; and also a driving of pile is comparatively—

Q. You estimate constructing the sea wall for how much a cubic yard?

A. \$22.00 a yard for concrete and forms.

Q. How much for the Channel, have you any idea?

A. No, I don't, because of the fact that I would have to know how far the dirt would have to be hauled.

(Testimony of H. V. Johnson)

Q. Considering the present condition of that property, with the erosion and exposure to additional erosion, you still believe your estimate of \$600 a front foot for a depth of 200 feet is fair? A. I do.

Q. In addition to the sales that are reflected in the Mason report which you stated you examined, and the Spreckels sale to which you have testified, what other sales of comparable property in the area have you considered?

A. The Atchison, Topeka & Santa Fe Railroad Company [62] from Long Beach Dock & Terminal Company.

Q. When was that? A. January 14, 1946.

Q. January 14, 1946? A. Yes.

Q. What property was that sale?

A. I am sorry, I did not hear you.

Q. Of what property was that sale, what property was sold?

A. The Atchison, Topeka & Santa Fe acquired from Long Beach Dock & Terminal Company property under condemnation proceedings.

Q. Under condemnation proceedings? A. Yes.

Q. That is an entirely different thing. Are there any voluntary sales of any property?

A. There is the Santa Fe from Advance Realty.

Q. Santa Fe from Advance Realty? A. Yes.

Q. When was that?

A. Well, that was at the east end of Channel number 2. But it has no dock frontage whatsoever.

Q. At the east end of Channel 2?

A. Yes, perhaps 400 feet east of Channel number 2, approximately where it would start in there.

(Testimony of H. V. Johnson)

Q. How much was sold at that time in that parcel? [63]

A. 22 thousand square feet, 22,844 square feet.

Q. When was that sale? A. November 6, 1945.

Q. November 6, 1945? A. That is right.

Q. What was the price?

A. \$32,751.09 per acre.

Q. \$32,751.09 per acre? A. Yes.

Q. That is for an acre?

A. The total consideration of those three parcels was \$82,500.

Q. Three parcels sold at the same time, were they?

A. That is correct.

Q. How much area was there in the three parcels?

A. Parcel number one had .855 acres; number two had 1.140 acres; number three had .524 acres, or a total of 2.519 acres.

Q. 2.519? A. Yes.

Q. That total consideration was what?

A. \$82,500.00.

Q. Did that include all the mineral rights?

A. That was the surface only.

Q. The surface only?

A. Let me read this. I think that is correct. No [64]
oil rights below the 50-foot level passed in this deed.

Q. There was a reservation of all mineral and oil rights below the 50-foot level?

A. That would be my understanding.

Q. Did the deed also reserve any right of drilling, do you know?

A. I don't have the record of all the terms of the deed.

(Testimony of H. V. Johnson)

Q. You do not know whether any reservation, then, was made for drilling operations?

A. No, I don't. That is not reflected in this report.

Q. Are there any other sales other than the ones you have testified to that you considered, when you considered the Mason report? A. Yes, there are.

Q. All right, what other sales?

A. George V. Giaconi Company, to Advance Realty.

Q. To Advance Realty? A. Yes.

Q. When was that sale? A. April 4, 1945.

Q. What parcel was concerned in that sale?

A. That was on the north side of Channel 2, slightly west of the, or westerly, rather, from the east—it would be 400 feet westerly from the east end of Channel number 2. [65]

Q. And does that have Channel number 2 frontage?

A. Yes, it did.

Q. How big a parcel was it? A. 1.32 acres.

Q. 1.32 acres? A. Yes.

Q. How much frontage was there along number 2 Channel? A. 300 feet.

Q. What was the price for that parcel?

A. That was subject to a deed of trust, recorded of record. securing note of \$17,000, with approximately an unpaid balance of \$14,000.

My record says also this was not a true sale but was a forced sale to cover a certain indebtedness.

Q. Sold to satisfy that trust deed?

A. Yes, sold to satisfy that trust deed of \$17,000.

(Testimony of H. V. Johnson)

Q. Any other sales that you considered that were not in the Mason report to which you have not heretofore testified?

A. There was the T. H. Breslin sale to George Breslin and Marguerite Breslin, and others.

Q. That was a sale from Mr. Breslin or purchased by Breslin?

A. Breslin, deceased, to George Breslin and Marguerite Breslin. [66]

Q. It was a purchase from the estate of the deceased father to the two sons and daughter? A. Yes.

Q. How much property was involved in that?

A. 3.06 acres.

Q. When was that sale—never mind. That is still a matter of record. What was the price?

A. \$80,000.

Q. Are there any other sales that you considered other than the ones to which you testified and those reported to Mason?

A. Long Beach Dock & Terminal Company to Hodgson-Greene-Haldeman Shipbuilding Company.

Q. When was that sale?

A. I don't have the date of that recorded in this report.

Q. How much area was involved there?

A. There were three separate parcels in that.

Q. All sold in one transaction?

A. Apparently so.

Q. What is the combined area there?

A. 3.6 acres, 1.75 acres, 4.35 acres.

(Testimony of H. V. Johnson)

Q. What was the price?

A. This was a lease, I believe. Let me see. This is a lease instead of a sale. I am sorry.

Mr. Lynch: I move that it be stricken then. [67]

The Referee: The motion to strike is granted.

By Mr. Lynch:

Q. Any other sales?

A. Certain lots on Cerritos slough.

Q. Lots on Cerritos slough?

A. Yes, those lots on Cerritos slough.

Q. What lots?

A. Consisting of six lots, not continuous. They have no direct frontage, certain lots on Cerritos slough, condemnation proceedings.

Q. I am not interested in condemnation proceedings. Those were not voluntary sales?

A. Those were acquired by the City of Los Angeles.

Q. Under condemnation? A. Yes.

Q. Any other sales?

A. None, that is all I have.

Q. Mr. Johnson, can you point out any property that has been sold and to which you have testified or is included in the Mason report that was sold for \$600 a front foot?

A. I have not computed the sale value per front foot on the various parcels.

Q. So far as you know, the Tom Mason report correctly sets forth the price obtained and the area involved in the sales therein mentioned, is that correct? [68]

A. There is only one, the only one I would question is the 3.07 acres in connection with sale number four, Los Angeles Dock & Terminal Company.

(Testimony of H. V. Johnson)

Q. Sale number four? A. That is right.

Q. That is the sale by Los Angeles Dock & Terminal Company to the City of Long Beach?

A. Yes, 3.29 acres. I have 3.07 acres. Let me see, in connection with sale number four—I don't have my Mason report. I believe it was offered as an exhibit.

Q. The Mason report shows that at \$31,459.00 per acre, does it not?

A. My copy of Mason's report is on file as an exhibit. I don't have it, and I don't have a copy.

Q. I will hand it to you.

A. Yes, Mason uses 3.29 acres, and I had that 3.07 acres.

Q. No material change in the price per acre, was it?

A. No, that is right.

Mr. Lynch: That is all.

By Mr. Iverson:

Q. How many times have you seen this Newport property? A. Four times.

Q. Over how long a period of time?

A. Since about, I think I saw it first about December, [69] 1945. And at that time I just started the appraisal of the Ryan Plant, in San Diego. And I drove by and viewed it for about an hour. And I made another examination in January, 1946, the early part of January, 1946; and two weeks ago today.

I have seen it five times. I saw it once during the summer—I don't know just what date—during the summer this year, July or August.

Q. So that before approximately two years ago you were entirely unfamiliar with this property, is that correct?

A. That is correct.

(Testimony of H. V. Johnson)

Q. Had you made appraisals of other property in that same vicinity before that time?

A. Not harbor properties. I had appraised several properties in Long Beach, in the vicinity, of different nature.

Q. This is the only harbor property you have ever appraised, is that correct?

A. With respect to water frontage it is.

Q. The purpose of your appraisal approximately two years ago was work done for Mr. Newport in relation to a plan he had in refinancing, was it not?

A. That is correct.

Q. Mr. Johnson, why do you place a different value on the property today than in January, 1946? [70]

A. Because of the fact I believe property, particularly, of this kind has enhanced in value to that amount. And privately owned harbor property is limited, practically no more there.

Q. Do you know any sales that have been made during the last two years which would indicate the sales price of these properties have increased any in that period of time?

A. I believe, referring to the Mason report, there has been a general increase of properties all through the years.

Q. You take that information from the Mason report and not from actual sales?

A. The Mason report information, with the sales.

Q. The Mason report was submitted about two years ago, was it not?

A. That is correct, and basing the increase upon the increases as he shows it, there would be about \$25,000 or \$26,000 increase of this property in the two years.

(Testimony of H. V. Johnson)

Q. You say you started out with the Mason report which was January, of 1946.

The Referee: The Mason report is dated October 30, 1945.

Mr. Iverson: I will stand corrected on the date of the report. October of 1945 being the date.

By Mr. Iverson:

Q. You say that the appraised value of this property [71] has increased, from January, 1946, from a value of \$331,000 to today \$419,000. On what grounds do you base that increase in price?

A. Upon the fact that all real estate, in this community especially, has taken about that rate of increase—25 to 30 per cent—and according to Mason's report it took just about the same increase in the last two years. That is, a comparative increase in the last few years.

Q. Are you familiar with the sale made by Brooks to the City of Long Beach, on Channel 3, on December 31, 1941? A. No, I am not.

Q. Are you familiar with the sale of Long Beach Dock & Terminal Company to the City of Long Beach, on Channel 3, on July 12, 1941? A. No.

Q. Are you familiar with the sale of the State Building and Loan Commissioner to California Sea Food Company on December 9, 1941, on Channel 2?

A. Let me ask where that would be on Channel 2.

Q. I will show it to you on the chart here. Right at the end of Channel number 2.

A. 4.35 acres?

Q. No, 8.17 acres?

A. On the north side of the Channel? [72]

(Testimony of H. V. Johnson)

Q. On the southeast end of the Channel, right on the corner of Channel number 2. A. 7.35 acres.

Q. Sold December 9, 1941, by the State Building and Loan Commissioner to the California Sea Food Company. Are you familiar with that sale?

A. No, I am not.

Mr. Iverson: That is all.

Redirect Examination

By Mr. Cahill:

Q. The property counsel asked you concerning last, is that water front property, that 7 acres owned by the Curtis Packing Company?

A. It has just a little corner of water front on it, possibly 60 to 70 feet.

Q. As a part of the 7 acres?

A. Just a little corner of it, the Channel runs into just a little corner of it.

Q. Are you familiar with the Southern Pacific property adjoining the Newport property, on Channel 3? I mean generally familiar.

A. The S.P. property right of way on the north side?

Q. No, the acreage the Southern Pacific Company has there?

A. My map shows Graham Brothers own one side, R. E. Allen, Trustee, on the other. [73]

Q. I am referring to this land Mr. Higgins testified concerning.

A. Yes, I am quite familiar with that.

Q. In your opinion, is that land comparable to the Newport six acres?

A. Yes, I would think it is quite comparable.

(Testimony of H. V. Johnson)

Q. Which has the greater or lesser value?

A. The water frontage on it proportionally to the acreage, I would say it is a very comparable value to the Newport property.

Q. Did you also in addition to your consideration of the Newport report, dated October 30, 1945, consider the Higgins report? A. Yes, I did.

Q. I don't have the date of that. Do you have the date of the Higgins report?

A. I have only a portion of the Higgins report in my file. And it is not dated.

Q. Counsel asked you on cross examination concerning the fact that your original appraisal was made in aid of a proposed plan of reorganization, at least, a loan for such a plan to the Bankrupt, and you have answered that is true. A. Yes.

Q. Have you been aiding the Bankrupt in obtaining such a loan? [74] A. I have.

Q. And from whom?

A. The California Western States Life Insurance, of Sacramento, for whom I have in the last few years been their chief appraiser, for Southern California, and yet.

Q. This parcel of land, this six acres, was appraised by you, together with all other parcels of land owned by the Bankrupt estate? A. Yes.

Q. For a loan in what sum?

A. Approximately \$400,000, or a minimum of \$400,000.

(Testimony of H. V. Johnson)

Q. Court and counsel might be interested in knowing what progress you made in obtaining such a loan?

A. Just at the time I was negotiating for the loan Mr. Paul Wright, the treasurer and vice president of California Western States Life Insurance Company, came down and looked over this property. And he verbally said the loan looks all right. He said, "Go ahead, make your application, we will appraise this property, and I have no doubt existing in my mind but we will make a loan for the \$400,000 minimum."

And about that time this came up. And I believe he has written that the confirmation of this loan depended upon the outcome of this case. [75]

And if I may, in the same breath, correct the Mason report, the date of the Blinn Lumber Company sale was March 11, 1946.

Going back to this loan, I have every reason to believe we can secure a loan, according to Mr. Newport's report to me, to settle with his creditors.

Mr. Lynch: I object to that and ask that it be stricken. That is a pure conclusion of Mr. Johnson.

The Referee: \$400,000 would not take care of the creditors. He owes the bank \$300,000 and quite a lot of unsecured creditors, attorneys fees. I would say it would be nearer \$600,000.

When did you begin to negotiate for this new refinancing, how long ago? I have heard about it for the last two years. Tell me when you started working on it.

The Witness: Serving my memory as best as I can, it was possibly April or May of 1946, when we actually began negotiations for the loan. It might have been a couple of months later than that.

(Testimony of H. V. Johnson)

The Referee: You took from May, 1946, to November, 1947, to find out from this man that he probably would make the loan for \$400,000?

The Witness: No, he told me—Mr. Wright came down, by telephone request, just at that time, and went over these properties. We took him over the property.

The Referee: Did you bring him to the 230 odd acres? [76]

The Witness: Yes.

The Referee: And on these properties he would loan only \$400,000?

The Witness: That is correct.

Q. By Mr. Cahill: Including also the oil rights, I assume?

A. I am not sure as to that, whether the oil rights were included in this or not. I doubt very much if they were, but they may have been.

The Referee: This six-acre property has a frontage, a water frontage of 500 feet. Wouldn't it be worth more per front foot if there were 600 or 700 feet?

The Witness: Yes.

The Referee: In other words, as I understand the situation, 500 feet is hardly adequate to fit and to serve the average size vessel, it would have to come in nose first?

The Witness: My understanding is 500 will serve, but I understand there is a working arrangement on the 250 feet just east of this, making available 750 feet for docking.

The Referee: That is providing the owner of the 250 feet, which is in Trusteeship, by a man by the name of R. E. Allen—

(Testimony of H. V. Johnson)

The Witness: No, I have in mind, reference to the Graham Brothers frontage there on the east of Mr. Newport's. [77]

Mr. Lynch: This estate has no working agreement with Graham Brothers.

By Mr. Cahill:

Q. 500 feet is sufficient to dock the average vessel that comes in there?

A. Yes, 500 feet is adequate.

The Referee: Some reference has been made to other sales having been made, and that you reach the conclusion that the frontage is inadequate, take 200 feet, is that sufficient?

The Witness: It is not.

The Referee: 300?

The Witness: No, I think nothing less than 500 or 450 feet, for different length vessels; 450 feet up to some of the larger ones, 500.

By Mr. Cahill:

Q. Apart from the sale of the Patten-Blinn lands there has not been a sale on either of these channels of water front property for over 20 years of frontage sufficient to dock a vessel?

A. That is entirely true.

Q. A single sale? A. Yes.

Q. Isn't it true as to that sale, a very great part of the acreage is not water front property, referring to Spreckels property? [78]

A. A larger portion of the properties have no water frontage whatever.

Mr. Lynch: I object, the court has before it the map there showing the dimensions of the property, and for

(Testimony of H. V. Johnson)

this witness to attempt to say 200 feet for water frontage, or 300 or 500 feet, is speculation of the rankest kind.

By Mr. Cahill: I will ask him—

Q. Do you know, Mr. Johnson, what is ordinarily and uniformly regarded as water front property, in reference to depth?

A. I don't believe I quite understand that question.

Q. When you use the term "water front property"—we have used it repeatedly—what do you mean by it? Do you mean property having a frontage that can go back—to what depth?

A. I mean adequate water front property is, at least, 200 feet deep and must have a channel sufficiently wide and deep to accommodate some of the larger boats, as Channel 3 does, which is from 35 to 40 or 45 feet deep.

Q. Then, you do not regard anything beyond 300 feet as water front property?

A. No, I would take a piece 200 feet as what we term back land.

Q. Would not have, in your opinion, use as water front property? [79]

A. It might have a sub-use, because it was directly adjacent on the south side of Seventh Street to the Electric Pacific Railway which could run a spur to this back land, to the water front property, and it would have a very definite use then.

Q. These occasions you visited this property you observed oil wells on the property? A. Yes.

Q. Do you know at the time you made these appraisals that there were oil wells thereon, producing oil?

A. Yes.

(Testimony of H. V. Johnson)

Q. Do you know the name of the lessee?

A. I think I have that somewhere in the record. I believe Mr. Newport told me the name of the lessee.

Q. Did you know there was an outstanding oil and gas lease on the property? A. Yes.

Q. That it had a number of years to run?

A. Yes.

Q. Did you take those facts into consideration in making your appraisals?

A. I did. And I did not base my valuation principally of the land upon which the oil wells are sufficient land for ingress and egress to them; I didn't figure in my computation; I left that to the wells alone.

Q. Have you testified previously — I think you have— [80] counsel asked a question that your appraisal is predicated strictly upon surface rights and not upon the value of the oil that may be in them.

A. That is correct.

Mr. Cahill: That is all.

Mr. Lynch: You testified you considered only 200 feet back from the water front as water front property. As a matter of fact, if a property has five, six, seven, or eight hundred feet depth it is more valuable property than 200 foot depth?

The Witness: Yes. That same answer I gave to the court.

By Mr. Hess:

Q. Do you know of any offerings of any water front property since March, 1946?

A. I am not familiar with any offerings. I am familiar with some leases down there upon which a valuation

(Testimony of H. V. Johnson)

was established to determine the lease and also the terms and conditions of the Long Beach Dock & Terminal lease.

Q. I take it from your answer you do not know of any water front property that is for sale except this parcel?

A. No, I don't. I know the Breslin property. It is not on the market. He will not sell it.

Q. Have you investigated to see if there is any property for sale or has been in the last year? [81]

Mr. Lynch: I object to that as wholly immaterial, whether there is or not any property for sale.

The Referee: I do not think that tends to establish a fair market value. They might hold it for sentimental reasons. The objection is sustained.

By Mr. Hess:

Q. What, in your opinion, has been the effect of the close of the war upon any change in value in water front property?

A. I am not quite hearing you.

Q. What, in your opinion, is the effect of the close of the war upon the water front values at Wilmington?

Mr. Lynch: I object to that as being wholly immaterial.

The Referee: It is quite speculative, highly conjectural. The objection is sustained. Let's get down to actual conditions.

By Mr. Hess:

Q. In your opinion, has there been an increase in valuations of water front property since the close of the war? A. In my opinion, there has, yes.

Q. Give your reasons for it.

Mr. Lynch: I object to that as being wholly immaterial, has already been asked and answered.

(Testimony of H. V. Johnson)

The Referee: It is a matter of common knowledge and information that land has been increasing. The objection [82] is sustained.

By Mr. Hess:

Q. I think you said the increase in value since December, 1945, was about 30 per cent. Did you say that?

A. Pretty close to 30, between 25 and 30.

Q. Have you given a 30 per cent higher valuation upon the water front property as of today, compared with December, 1945?

A. I would not say upon the water front property alone, but upon the property as a whole, because of the extreme demand for warehouse storage space. And based upon the information that I received, attorney McCarthy, who is also attorney and secretary for the Long Beach Dock & Terminal Company, informed me that they had a tremendous shortage of warehouse surface land in that particular vicinity, and the amount they had recently leased was upon a 15 year lease.

The Referee: He has answered the question.

By Mr. Hess:

Q. I note you gave a valuation of \$1.50 per square foot on the back end of the property, of the Newport Company, which amounts to \$65,000 an acre. Did you make the comparison between the values per front foot of the back end of the Newport property with the back end of the Spreckels property? What I am getting at is whether you would appraise the back end of the Spreckels property, [83] back of the 200-foot line, at the same valuation of \$1.50 per square foot.

Mr. Lynch: I object to that as immaterial.

The Referee: The objection is sustained.

Mr. Hess: That is all.

(Witness excused.)

ROY G. MEAD,

a witness produced by and on behalf of the Objector, after being duly sworn, testified as follows:

Direct Examination

By Mr. Cahill:

Q. What is your name? A. Roy G. Mead.

Q. Where do you live? A. Glendale, California.

Q. What is your business or occupation?

A. Consulting engineer and geologist.

Q. How long have you been so engaged?

A. For the past 26 or 27 years.

Q. And your school of training in your profession was what?

A. Honor graduate University of Arizona in geology and mining engineering.

Q. And where have you practiced your profession?

A. Practically every state in the west, but particularly in California. [84]

Q. Are you a member of any societies of geology or engineering?

A. Yes, I am a member of the American Institute of Mining and Metallurgical Engineers, also a member of the American Association of Petroleum Geologists.

Q. Are you also a civil engineer?

A. I am a registered engineer in the State of California.

Q. Have you had occasion to become familiar with oil field practice, particularly, in the Los Angeles basin?

A. Yes, for the past 25 years the major part of my work has been on oil geology in the various fields in California, and particularly, in the Los Angeles basin.

Q. Are you familiar with the practice in producing oil wells? A. I am.

(Testimony of Roy G. Mead)

Q. Are you familiar with the practice in reference to the owner of the land upon which the oil wells are located?

A. Yes, a large part of my work has consisted of appraising oil properties for the operator and the land owner and in doing that work it is necessary to be familiar with royalty interests, as well as the operator's interest.

Q. And will you state to the court the names of some [85] local people you might know that have employed you during these years in such work and such practice?

Mr. Lynch: I will stipulate as to his qualifications. I think the questions counsel is about to propound to this witness are wholly immaterial to this hearing, anyway. I will stipulate to his qualifications.

Mr. Cahill: I would rather not accept the stipulation without putting in some statement of what his experience has been.

By Mr. Cahill:

Q. Will you state briefly the name of some of the oil companies, particularly?

A. I have made two separate appraisals at different periods of the Wilshire Oil Company, which included all their oil properties, refineries, pipe lines, terminals, and so forth.

I have made an appraisal of the Joseph B. Dabney Estate, a large part of which consisted of oil leases, oil royalties; and he was also an operator in the Long Beach field.

I did appraisal for the George Getty Company and for Land Owners and Royalty interests; the Eckert and Lloyd properties, in the Ventura oil fields; and the Lloyd properties, at Ventura.

(Testimony of Roy G. Mead)

Q. In the Lloyd case did you have occasion to appraise the value of royalties?

A. Yes, the oil royalties in the Lloyd and Hartman. [86]

Q. You also represented the United States of America?

A. Yes, I was employed as field examiner by the United States Land Office a number of years; and quite recently I was, within the last two or three years, I was employed by the United States Government on a case involving oil prices, in the Kettleman Hills oil field. I was also employed about a year ago by the State, representing the State in their royalty interests in a case involving the Owen's Lake soda deposits.

Q. When you say the State, is that the State of California? A. Yes.

Q. Have you had occasion to appraise oil properties and interests therein for inheritance tax purposes?

A. Yes, quite a percentage of my work consists of appraising properties for inheritance tax purposes, both for the royalty owner and the operator.

Q. Have you been employed by any of the major oil companies in this area?

A. No, not recently. I was employed by the Associated Oil Company a number of years ago, in the Long Beach oil fields.

Q. They are regarded as a major company, the Associated? A. That is one of the majors. [87]

Q. And, rather than put it in the usual form of a strictly hypothetical question of great length that none of us might clearly have in mind, I will state some facts to you and ask your opinion, as an expert, as to what would

(Testimony of Roy G. Mead)

be the usual and appropriate course of procedure under those facts.

The matter before the court at this time concerns the sale of six acres of land. I guess you are familiar with the location of the land from what you have heard in the courtroom.

A. Yes, I have seen the land.

Q. You have seen the land?

A. Not recently, but I am familiar with that particular area.

Q. And you are also advised that there is an oil and gas lease on that six acres, to the Universal Oil Company, made in 1938, and running for an indefinite period, but not to exceed, in any event, 25 years. You are so advised?

A. I understand the lease does not terminate, but can run for 25 years? I am not quite clear.

Q. The lease is a 30-day lease, but its terms are continuous as long thereafter as oil and gas are productively produced, but not in any event exceeding 25 years.

The sale here proposes to sell the surface rights to the proposed buyer, but to permit the seller, the Trustee in [88] Bankruptcy, to retain his right under the present oil and gas lease, but not otherwise.

Mr. Lynch: Unless you add something else, your question is not correct. The rest is the sale of all the property, including all mineral rights, saving only, however, to the Trustee the right under this lease, only any minerals, oil, whatever it may be, go with this sale, except such as we are entitled to produce under the lease.

Mr. Cahill: That is correct. That is what I was endeavoring to state to the witness. I think you put it in better order. That the proposed sale does propose to

(Testimony of Roy G. Mead)

convey all the mineral rights in the six acres, reserving, however, to the Trustee such rights as he may have as the lessor under the present gas and oil lease to the Universal Consolidated Oil.

Having those facts in mind, I will ask you if, in your opinion, such a proposed sale with such reservations is regarded as sound practice on the part of the land owner.

Mr. Lynch: I object to the question on the grounds it is not a subject for expert testimony. That is number one.

Number two, it is wholly immaterial in this particular proceeding, there being no effort here to sell any oil royalty or rights under that lease. The only sale that is contemplated is the property, subject to the lease. And whether it is or not good practice is wholly immaterial in [89] this proceeding.

The Referee: I will let him answer. Maybe he can tell me something I have not heard before. When you say "good practice" do you mean by that that is good business?

Mr. Cahill: Yes, the things commonly done by land-owners.

The Referee: I do not think that is permissible, because you have a bankruptcy proceeding, which commonly means liquidation and not operation. The whole intent of bankruptcy is to liquidate and pay the creditors. But if you want him to tell me whether that is the business practice, I will listen to your answer.

Mr. Cahill: It will be so limited as to this question.

A. As I understand the question and the explanation, answering the question, I would say it would not be, because the oil interest would be jeopardized and the owner of the property, who now has the property, would

(Testimony of Roy G. Mead)

not get the oil rights after the expiration of the present lease.

Mr. Lynch: We concede that.

The Referee: Yes, I wouldn't argue on that. You understand, under this proposed sale, this bankrupt estate is to receive whatever royalty there is at the rate of 35 per cent that is produced by this Universal Consolidated Oil Company, up to 1963?

The Witness: I understand that.

The Referee: They are not selling that. We are trying [90] to hold onto that.

Mr. Lynch: When the lease terminates for any reason—by virtue of time or failure to produce in commercial quantities—and under those circumstances it is quit claimed back by Universal Consolidated Oil, the rights of the Trustee in this estate cease.

There is no dispute on that.

By Mr. Cahill:

Q. That is the fact. That being the fact, what, in your opinion, is the danger of the Trustee in Bankruptcy in selling this asset in this manner?

A. He would lose the protection that would run to the landowner in the event the lease was terminated.

Mr. Lynch: There is no question about that.

The Witness: Therefore, the value would be lower.

By Mr. Cahill:

Q. Because of that factor is it true that those who would purchase, and that a sale not having been made—the proposed sale—the interest in the oil from the Trustee, will they pay, in your opinion, a lesser figure if the sale is consummated on that basis?

(Testimony of Roy G. Mead)

Mr. Lynch: No sale involved. What we get for the oil is fixed by the terms of the lease. We get a certain percentage. The lease provides that will be sold at market. The question of whether we sell this property does not affect the price we get for the oil. [91]

The Referee: The question resolves itself into this: Would a change in ownership of the land affect the value of the lease? Is that what you want him to answer?

Mr. Cahill: I will put it this way.

Q. The estate has today certain interests—it is the owner of minerals, subject to a certain executed lease. If those minerals were offered on the market today they would bring a price, which we will indicate as X price. Now, query: If this sale is made so that the seller, the Trustee in Bankruptcy, no longer owns the minerals in place, but he simply owns an interest under an oil and gas lease, will the buyer who would have today paid X price be only willing to pay then a day after the sale takes place, Y price, presumably a much lower price?

Mr. Lynch: We are not concerned with any rights under the lease. We are reserving the rights under the lease.

The Referee: He says if the land ownership passes from A to B, would that affect the sale price of the lease?

Mr. Lynch: Is that what you are after, the sale price under the lease?

Mr. Cahill: We have today much more than rights under a lease. Tomorrow the sale goes through. We will then only have an interest under a lease and no longer the double interest we have today. That difference in value—in other words, do we appreciate an asset the Trustee [92] has today, but may make a sale—

(Testimony of Roy G. Mead)

The Referee: He can answer.

The Witness: Yes, I would say he would. It is a case where you are a direct royalty owner and after the sale there would be an over-riding royalty which would be affected by the old lease.

By Mr. Cahill:

Q. In your opinion, would his selling price, over-riding royalty, be much lower than the interest we have today?

A. Yes.

Q. Would you have any idea what percentage, approximately?

A. Well, that would vary with conditions. It might be the same in some cases, and in other cases it might be 50 per cent lower. In order to tell exactly what that would be you would have to make an appraisal of the oil and ascertain how much oil would be recovered after the lease was terminated. I would say it would be, at least, 25 per cent less.

Q. In your opinion, the value the Trustee has today would be depreciated about 25 per cent through making this sale in the manner that it is proposed to be made with the reservation only as to our interest under the lease?

A. That is just an opinion, but it could be verified [93] by an appraisal of the oil rights.

Q. Have you found in your experience that oil royalty buyers will pay less, substantially less, where what they are buying is only an over-riding royalty under a lease?

A. No, they don't pay as much landowner royalty where lower rights run, when the land is more desirable than the over-riding royalty. That depends upon the terms of the contract.

(Testimony of Roy G. Mead)

Q. The reasons why—

A. The landowner royalty runs with the property. If a lease is terminated the landowner still has the mineral rights, and he can either operate the property himself or he can lease again. In the case of over-riding royalty, when the lease terminates, that mineral right is lost and ceases to be.

Mr. Cahill: That is all.

Cross Examination

By Mr. Lynch:

Q. What you mean is if this sale goes through this estate's royalty interest would be less valuable because it carried only with it the right to produce under this particular lease?

A. That is exactly what I mean.

Q. In other words, if the sale is made and the rights of any future development taken away, then [94] this protection under this particular lease has less value than it would if it carried with it future production?

A. That is true, anyone that bought this royalty today before the sale would have no rights to any future development.

Q. He would have only rights under this lease, and without that lease he would have no right in any other lease on the land?

A. That is correct.

Mr. Lynch: That is something that has been conceded all along.

The Referee: Have you any other questions?

(Testimony of Roy G. Mead)

Redirect Examination

By Mr. Cahill:

Q. Are you familiar with the various producing horizons on the six-acre tract?

A. In a way. I have not made a study of oil horizons in this area, but there are several producing horizons in the Wilmington area which extends under all the properties.

Mr. Lynch: This witness has not made an examination. Mr. Carrey made one and his report in this record. I am perfectly willing to stipulate that that may be considered a part of this record.

Mr. Cahill: When was that? [95]

Mr. Lynch: I don't know, but it is a written report.

Mr. Nelson: Will you stipulate that all the reports—

Mr. Lynch: I will stipulate that may be considered as part of the record.

Mr. Cahill: I am willing to accept the stipulation. You will recall Mr. Carry gave testimony in which he gave his opinion as to the possibility of production as to these layers from the Ford Zone, but the report was made as of a time when another and thick producing horizon on the adjacent land had not been discovered, 237 Zone. So that if this witness has any information in respect to 237 Zone I would like to have it.

Mr. Lynch: He has stated he has not made any study of it. Counsel has a letter from Mr. Carry recently written, and I am willing to stipulate that letter may be introduced, and if Mr. Carrey was called he would so testify.

Mr. Cahill: Counsel is reading a letter. And I will state that Mr. Carrey attended as a witness the day this

meeting was first called, sat in the spectators' section, and did not announce to Mr. Lynch or myself that he was in court. And he could not attend last Friday or today. So that Mr. Lynch offered, if Mr. Carrey would write a letter stating his loans had been to Mr. Metcalf, which are substantially the same matters to which Mr. Metcalf has been giving his testimony; and [96] Mr. Lynch would stipulate what Mr. Carrey said could be considered in evidence, and has written such a letter which, I believe, did set forth pretty much all that Mr. Carrey would testify to if he was here in reference to the policy of making a sale of lands on this sort of a basis. It does not set forth testimony I would like to obtain from Mr. Carrey, in time, as to the reports which the Trustee made that because of the supposed shale, to being unable to obtain the oils that may underlie the land in the Ford Zone, the 237 Zone. That is one of the matters discussed in Mr. Carrey's report. That is limited only to the Ford Zone. So because of the continuances I am a little bit oppressed and by the failure of having Mr. Carrey here at this time.

The Referee: I will be here the balance of the year. I will give you all the time you want.

Mr. Cahill: Mr. Nelson indicates that he thinks it does not sufficiently cover the subject and that we would be unsafe in closing our case just relying on the letter alone.

Mr. Lynch: We have a very practical problem in this case. We are willing to stipulate to this letter. Mr. Carrey said when he left that he could not be back until sometime after the first week in December. And we have a time limit on this sale. And I assume there may be a review. And I think it is very necessary, [97]

essential to go ahead. And I am trying to facilitate this by offering to accept Mr. Carrey's letter and also Mr. Carrey's report which is already a matter of record in this court.

The Referee: That is all right so far as I am concerned.

Mr. Nelson: Mr. Carrey's letter was quite acceptable insofar as it goes, deals with this question that has been under discussion just now. That is the effect on the rights of the landowner if the land is sold without reservation, only of the royalties payable under the lease. This land carries with it all of the mineral substances under it except such as may be taken by the present lessee, Universal Consolidated, during the remaining life of the lease or until its forfeiture or abandonment.

Mr. Carrey has testified in this matter before, as a geologist, and he is the advisor of the Trustee which has been through the proceeding. I think he is better informed than anyone about the conditions here, geologically and otherwise.

For example, four years ago, in a hearing in this court, there was testimony about the present value of the royalties under this lease and there was testimony on the part of some of the witnesses produced by the Security First National Bank, that the present value then of [98] this royalty interest of the bankrupt was two hundred odd thousand dollars. I think the fact is since that time the Trustee has taken, by that royalty interest, a sum largely in excess of \$200,000, and at the present rate the royalty revenue to the Trustee is running, I am told, as high as it was then.

There are two zones, theoretically, below the present zones.

The Referee: They have not been found yet.

Mr. Nelson: No, but they have been found within 1200 or 1400 feet.

The Referee: How soon can you get him here? I am not going to let this thing drag along.

Mr. Lynch: Mr. Carrey will not be back until the second week in December, according to his statement when he left.

Mr. Nelson, I call your attention to one thing you would probably stipulate to. And that is a well was drilled into the bed zone, and was found dry.

Mr. Nelson: We will say we are told about that well, that that drill penetrated a zone in one of the wells, a poor producer, but probably not at a spot where it should be expected to reach the zone.

Mr. Lynch: Will you stipulate they will testify, if called, that they did drill a well into what they believed to be the bed zone, to a depth of 5918 feet. [99]

Mr. Nelson: I will accept the stipulation that they drilled to a depth they thought was into the bed zone; but further, they did not drill into the lower or the so-called 237 Zone, which may or may not exist under this property but which, if it does, may make it very valuable.

We may sell this property for \$198,000 and realize a net of about \$165,000 or \$170,000, after all expenses are paid. We depreciate the value of the royalty interests. When this lease is limited here by abandonment or anything else, there is nothing more we can do with it.

Universal may wish to elect to go down to that other zone. I don't know whether this lease provides to go

deeper. In other words, if any more oil is discovered on that land—

Mr. Lynch: Yes, if Universal goes down in its option for any further oil we get the benefit of that under this lease.

Mr. Nelson: While I am not suggesting this situation, it could be done in the same situation. Universal finds it convenient to get rid of that by throwing up its lease, and at some later date—

Mr. Lynch: If they do something and it assumes dishonesty, it could be set aside.

Mr. Nelson: Suppose they elected to abandon it?

Mr. Lynch: I think it could be set aside as a fraud. [100]

Mr. Nelson: It could happen a new lease be made by someone else, and very valuable rights taken away.

Mr. Lynch: I will concede that is possible, but not probable.

Mr. Cahill: Mr. Newport informs me he has been in communication with Mr. Carrey and that he can be here, apparently, not this week, but next week.

Mr. Lynch: I asked him when he left he was going to be back next week. And he said he would not be back until the second week in December.

Mr. Cahill: That is this week?

Mr. Lynch: The first week in December.

Mr. Cahill: One thing I have in mind, listening to this dialogue between Lynch and Nelson—I guess it is

a dialogue—Mr. Carrey has showed me the location of the well we are discussing, and he says the location shows definitely, shows definite indications of oil.

The Referee: I used to live in Arizona and the miners down there used to say one man could see as far down in the ground as another. They may have been in error. You have got to dig and dig and see what you get. I do not want to continue this matter. I want to give you my ruling, one way or another, this week, not later than the end of the week, because of having a time limit on this and, undoubtedly, it will be reviewed. And if the Judge does not agree with me it [101] will find its way to the Circuit Court.

Mr. Lynch: We have 60 days from October 27th.

The Referee: I haven't a lot of time.

Mr. Cahill: Mr. Newport says he believes it is possible to get Mr. Carrey by Friday.

The Referee: We will take a short recess.

(A short recess was taken.)

The Referee: Have you presented all the evidence you want me to hear, on both sides?

Mr. Cahill: No, your Honor.

The Referee: Then it will have to go over to another date. I think we will continue it to next Wednesday morning.

Mr. Iverson: If it is agreeable with the other parties I would like to call Mr. Mason out of order.

The Referee: All right.

THOMAS F. MASON,

a witness produced by and on behalf of certain creditors,
after being duly sworn, testified as follows:

Direct Examination

By Mr. Iverson:

Q. State your name? A. Thomas F. Mason.

Q. What is your occupation?

A. Realtor-appraiser.

Q. How long have you been in that business? [102]

A. Since June, 1923.

Q. What has been your business experience in appraising real property?

A. Since June, 1923. Prior to entering the real estate business in June, 1923, I was in charge of all rail operations in the Wilmington section of the Los Angeles Harbor, the rail activities of the Southern Pacific, the Pacific Electric, Union Pacific, and the Los Angeles Harbor Belt Line.

Since June 1923 I have appraised property for individuals, and corporations, city and county of Los Angeles; State of California; the Division of Parks and Highways; the United States Army; the United States Navy.

And among the properties I have appraised, excluding FHA, HOLC, Federal Home Loan Bank, Veterans Welfare and numerous building and loan associations and financial institutions, covering residential properties within the area of San Luis Obispo on the north, San Bernardino on the east, Laguna Beach on the south, and Avalon on the west, I will confine the rest of my qualifications to harbor matters and beach properties.

I have appraised all the privately owned beach property of the city holdings of the City of Los Angeles,

(Testimony of Thomas F. Mason)

the City of Santa Monica, the City of Manhattan Beach, [103] and the City of Redondo Beach; from the Orange County line to Portuguese Bend and the northerly part of San Pedro; I have appraised property San Pedro acquired for a park, which included the water front.

I have appraised the entire holdings of Los Angeles Harbor department, of Los Angeles Harbor, in 1926.

I have appraised the property owned by the Union Pacific on the south side of Cerritos Channel, in the Long Beach area, just east of the Henry Ford Avenue, or what was known as the Budger Avenue-Bosque Bridge,

I appraised the property acquired for the site of the Consolidated Ship Yards, at Wilmington. And I appraised the land occupied by the Consolidated Ship Yards, in its negotiations between the Maritime Commission and the Harbor.

I appraised the right of way acquired for the Maritime Commission's railroad lease, and operated by the Pacific Electric Company, operated on Anaheim Boulevard to Cal-Ship, on Terminal Island.

I appraised the field acquired and used by the Navy during the war, which is east of Terminal Island.

The Referee: I think this gentleman is pretty well qualified. He has covered almost all southern California. I think that is sufficient unless you want him to go ahead.

Mr. Iverson: No, I wanted to satisfy your Honor he [104] was qualified.

The Referee: I am pretty well satisfied.

Are you familiar with the property which is the subject of this sale?

(Testimony of Thomas F. Mason)

The Witness: Yes, 5.9909 acres owned by the F. P. Newport property, known as the F. P. Newport property, three blocks easterly of the Southern Pacific-owned land there and just westerly of the Graham Brothers' land.

By Mr. Iverson:

Q. Have you some opinion as to its fair market value?

A. I have.

Q. What, in your opinion, is the fair market value of that parcel?

A. In my opinion, the fair market value of the surface rights only of this property under discussion here is \$196,350.00, as of the date of this trial.

Q. Can you express to this court a reason for your opinion for that value?

A. The reason, one of the reasons, for my opinion of this value is my knowledge of the Long Beach Harbor area in the transactions that have taken place in the last 26 years, beginning with the option given to the City of Long Beach, about 1922, for 240 some acres owned by the L. A. Dock & Terminal, and submitted [105] to the citizens of Long Beach, and not voted; and a subsequent sale of 21 acres of that to what was known as the Pacific Dock & Terminal Company, headed up by T. T. C. Gregory, of San Francisco, and others; and their disposing of all but approximately 100 acres of the land acquired in 1919; the flood waters coming down the river had filled in the channel to the point that just prior to the acquisition by the Pacific Dock & Terminal Company, the channels were practically filled; one or two spots near the turning basis that had about eight feet of water. The rest was practically submerged tide lands at higher tide, might be some portions of the land exposed; the

(Testimony of Thomas F. Mason)

construction of the flood control channel to the east of the harbor and east of the subject property; the dredging of the harbor subsequent to the Pacific Dock Terminal's purchase, to a mean depth of 45 feet; filling in Channel 1, creating additional land, and dredging of Channels 2 and 3 of the turning basin, and the entrance to the harbor on an approach seaward from the harbor; sales to Exeter Coal Yard people, on the north side of Channel 2; and a sale to Patten-Blinn Company, and subsequent re-sale, or option, to the Santa Fe Railway, at approximately two years ago. That was never exercised. Then, the subsequent sale to the Spreckels people, which deal included the acquisition of the Pacific Electric right [106] of way that extended westerly and diagonally through the property, almost through the property; and the sale to Rio Grande Oil Company, from C. H. Goodhew and Paul Walker.

And the sale to Merritt, Chapman-Scott, on 3, subsequently sold by them to Richfield Oil Company. This joins Graham Brothers east of the subject property.

The sale from the Pacific Dock & Terminal Company, of 49 acres, which was subsequently sold; ten acres to Procter & Gamble, about 1938; and about 1940 they sold two more acres to Procter & Gamble, easterly of their then holdings.

The analysis of the sale to the Spreckels interests would reflect and as a check, confirm the opinion of the value that I have expressed; and the fact that the harbor properties, generally speaking, and considering the 500-foot depth to be the principal part, are the most valuable part of water frontage, which is confirmed by the rates charged by the harbor district in the leasing of vacant water

(Testimony of Thomas F. Mason)

frontage; and the rate charged for that area remaining to the rear lands, a ratio of about—if one frontage is 100 per cent, the rear land is 70 per cent less valuable, on the rates charged per front foot per annum.

The size of the property as having 500 feet water front, which is adequate for a given number of ships [107] operating in the harbor—lumber schooners and ships of that nature—but larger vessels require additional length.

The fact that the property is at right angles with the water front, 521.9 feet deep, being laid out diagonally, and a spur track taking off from the Pacific Electric, from the east to the west, you can get on the property with a minimum of loss.

It is my opinion if the concrete tanks were not along the easterly line of the property a spur track could be taken off from the east and parallel the easterly line of the property to the water front; then to bring in spur tracks, along any dock that might be on the front, there would be the main loss because of the diagonal approach of the westerly and easterly line. The concrete tank would mean that the tank would have to be moved westerly. I call it a concrete tank. It is in conjunction with the oil operations on the property.

The various sales, the various leases, made at the harbor for some time past—and I am well acquainted with them and have knowledge of the prices paid—all those things enter into my consideration. And my consideration is the opinion expressed.

Q. This value you have placed there, is that for surface rights only or does that include oil rights?

A. I believe I stated it was for surface rights only. [108]

(Testimony of Thomas F. Mason)

Q. Are you familiar with the fact that the property is eroded on the channel side?

A. Yes, the erosion on the channel side—well, I have not had a survey made or scaled it from the map. Estimating it from observation, I would say 150 to 160 feet approximately, average, from the bulkhead line back to the high land.

Q. To place the property in first class useable condition what work would be necessary?

A. It would be necessary to build, at least, a minimum of bulkhead and fill the land. By a minimum bulkhead I don't mean the type of bulkhead in around the Southern Pacific properties, when the filling operations took place, at the time, the last of 1929 or early 1930. That was a wooden bulkhead anchored to pile and dolphins, sealed this along the front.

As near as I can find out from checking and my experience, I think the minimum bulkhead would be one composed of about 15 tons of riprap to the lineal foot, with the concrete sea wall on top of it. That runs about three quarters of a yard of concrete per foot.

Q. Have you made a study of the cost of the work that would be necessary?

A. The bulkhead I have just mentioned would cost approximately \$105.00 a foot. The type of bulkhead the City of Long Beach is putting in now is considerably more [109] than that. I think the main bulkhead would suffice to hold the land in back of it, support it for any structural use, railroad tracks and whatnot that would be put on it.

(Testimony of Thomas F. Mason)

Q. What would that cost, putting in the bulkhead?

A. \$105.00 per foot for 50 feet. That would be \$52,500.00.

Q. Then would it also be necessary to fill in back of that?

A. It would be necessary to fill in back of the bulkhead, yes.

Q. Have you made a study of the cost of that?

A. Just a rough estimate. Scaled from the map, without taking into consideration or having surveys made, the water in front of the Newport property originally dredged to a 45 foot depth, soundings now, I think, run somewhere from 35 to 40 feet.

If you build a bulkhead there and go back 150 to 160 feet back of the bulkhead line, where the erosion has to take place, it would be conservative to estimate that the fill required would be from zero on the north side to, say, 20 feet at the water's edge, to striking a minimum average, or an average of ten feet. An average of ten feet for 150 or 160 feet deep, 500 feet long, would be somewhere between 27,000 and 30,000 cubic yards of fill. And that fill could be secured from one or two [110] sources. And the last job of that kind for a comparable size in the Los Angeles Harbor was a fill at eighty cents per cubic yard.

A dry fill, if placed in there, would settle, being loose dirt. And there would be a loss of about twenty percent, which means you would have to have twenty percent more yardage of dry fill than wet fill. And, twenty percent of eighty would be about ninety-six cents a yard for dry fill. And to hold a job, for a small job of that

(Testimony of Thomas F. Mason)

kind, if dredged, there would be the dredging and leveling off process after the dredging has been filled.

Q. What would that be for the entire job of filling in, you estimated?

A. \$52,500.00, say 30,000 yards filled at a dollar would be \$82,500.

Mr. Iverson: That is all.

Cross-Examination

By Mr. Cahill:

Q. To use any of the other lands on either of these channels for the same purpose wouldn't you have to do the same things in many of them before using them, say, put in improvements?

A. You would have to put in some type of bulkhead, and I stated the minimum. You would have to do that. All areas in there are not eroded. Originally [111] they were bulkheaded. From Channel 2 to Channel 3 still has the old wooden bulkhead that was put in to retain the fill when the channel was dredged as it was then. If it is used for shipping purposes, with docks and railroad tracks, it would be necessary to put in some type of bulkhead. And I have tried to outline what I think is the minimum bulkhead. The City of Los Angeles and the City of Long Beach put in much more costly bulkheads.

Q. Is it practical to use piling instead of bulkheads?

A. You put in bulkheads to retain the soil. You cannot build this pier on piling. As a matter of fact, that is the way they are all built, either concrete, piling, or otherwise, except on jobs like the Navy did at San Diego, where they built a concrete sea wall the full depth of the harbor and built the docks on that, on shoreward.

(Testimony of Thomas F. Mason)

Q. My point was, it appears to me the problem you have outlined to get the land in condition for buildings is a common problem to the various lands there.

A. It is. I was merely answering your question.

Q. I want to ask you this question: You spoke about a ship 500 feet long. Are you familiar with the ships that use these channels, the length of them?

A. Yes, without getting too specific without my [112] records. I was in charge of rail operation in the Wilmington area some five years prior to the last of 1923. No cargo ships coming at that time 535 feet long. A lot of lumber boats are 350 or 400 feet, and it would be ample space to use them. A good number of cargo boats are of that dimension, and some are larger.

Q. Have you any idea what percentage of the total that come there and that would use these channels are 500 feet or over?

A. I wouldn't want to guess. I could check it for you.

Q. Is it a small percentage, medium, or large?

A. No, in the—this statement is based on my experience in 1920 and 1923.

All the American-Hawaiian ships that were docking at Pier A were about 535, or larger. The L. A. Steamship Company ran about 50-50. The Pacific Steamship line ran about 40 percent of the larger ones to 60 percent of the smaller ones. I would say that the percentage rate would be somewhere between 40 and 50 percent, as I recall.

(Testimony of Thomas F. Mason)

Q. About half of the vessels that would come in there could dock on the 500 feet and the other half could not, roughly?

A. That is correct. Our 535, in order to dock there, our larger boats, it was common practice after [113] docks were built to put shore points on both sides, to hold income, to work jointly in matters of that kind.

Q. You said you considered various leases in determining your appraisals, in determining leases down there did you consider a recent lease made by Los Angeles Dock & Terminal Company to an undisclosed lessee, where they appraised the land at one dollar and fifty cents a foot and set the rental accordingly?

A. I am not familiar with it.

Q. Do you know Mr. McCarthy, the attorney for the Dock & Terminal Company, who used to be attorney for the Harbor Department, I guess it is?

A. I met Mr. McCarthy sometime. I mean I presume it is the same man.

Q. If you knew that that landowner and the Pacific Dock & Terminal Company had made such a lease within the last few weeks, where the rental was set on an appraisal of a dollar and fifty cents a square foot, would that change your opinion here?

A. It might influence my opinion. I would want to know all the terms and conditions surrounding it and the purpose, what it is being used for, and so forth. I will

(Testimony of Thomas F. Mason)

not say that it would not influence me one way or another. I would want to know all the facts about it.

Q. Is it not true that in recent years that, [114] apart from the S. P. piece of land, there have been no sales of water front at all?

A. That is true. The Spreckels property, what we have been referring to as the Spreckels property, has been on the market and advertised in endeavoring to find a purchaser, for approximately ten years. That is, a couple or three years prior to the war and subsequent thereto it has been on the market for one figure or another, since shortly after Patten-Blinn decided that they were not going to utilize it as a lumber yard.

Q. A large parcel, 35 acres?

A. The map shows 35.6 something acres, including the Pacific Electric Railway right of way, which bisected the area for years.

Q. Isn't part of that, at least, a mile from Channel No. 2?

A. I don't think so, but I will check. Taking the piece of property which is almost triangular in shape and taking the end farthest distant, you can get on a triangle, on a direct line. It is more or less at right angles with Channel 2. It is about 1500 feet to the farthest distant point from the water.

Q. You stated you claim a depth of 500 feet is still water front property. Is there any universal ruling on that? [115]

(Testimony of Thomas F. Mason)

A. I said it was generally accepted, 500 feet was the maximum depth for the highest priced portion of this water frontage. And that is largely based on the rates, for example, of the harbor departments, where they charge five cents per square foot for the water frontage back to 500 feet, and three and a half cents per square foot, per annum, in the rear thereof. It happens if the harbor department owns some land that does not front on the water and there is an intervening strip privately owned property of two or three hundred feet, then they charge three and a half cents per square foot for that back land.

Q. That schedule seems rather arbitrary for our own purpose and convenience—

A. No, those factors are established in Los Angeles and San Diego harbors, that the idea is for all general use. If you take a typical case, for harbor use, for its highest and best use, you would want sixty feet for the open wharf, with two tracks so that cargo could be loaded from and to the ship with high line. You would want at least—a 100-foot wide shed would be rather narrow, preferably 125 to 150 feet; you would want another 10 to 15 feet for the loading platform; you would want sufficient low land for approximately four house tracks to supply the freight house shed with trackage and additional space [116] for trucks, and a roadway down which the minimum depth you could use to an advantage for that type of shipping, which would be approximately 300 feet.

(Testimony of Thomas F. Mason)

Q. That would indicate that your scale rule as to what we call the S. P. portion, that you have a total depth of 1500 feet and approximately, at the maximum point today, about 1000 feet would be land in depth that is not water front property in this parcel?

A. That is at the apex of the triangle, yes.

Q. I will ask you this question also. You are a real estate man? A. I am, yes.

Q. Didn't you bring to this Trustee in Bankruptcy, in December, 1945, an offer, as a broker, on this particular parcel of ground?

A. I did. And that is, it has been referred to as an appraisal report, Tom Mason's data. That was more or less a brief submitted to the Trustee, at his request, of the number of sales that had taken place in the area at the time.

Q. You obtained at that time a bid from the Copra Oil & Meal Company of \$198,000?

A. That is right.

Q. That was in December, 1945?

A. Approximately, right around the latter part [117] of 1944.

Q. Are you of the opinion there has been no increase in the value in the elapsed time of almost two years?

A. At that time it was my opinion that the property was worth \$184,000, and I recommended to my client,

(Testimony of Thomas F. Mason)

so recommended to him, after considerable negotiation; and their desire to have a place of their own for the handling of the Copra Meal, there were conferences and what not, and they raised it to \$198,800.00. I believe the present prospective purchase came in with an offer to the Referee a little above, in the neighborhood of my first offer, and which was my opinion of value of \$184,000.

Q. As I recall, the offer made in 1945 had been accepted, the Trustee petitioned to pay you a fee as a real estate broker for making the sale.

A. That is not true. I have not received five cents.

Q. I asked the question, whether the Trustee had not petitioned, hadn't he agreed to pay a fee in that deal?

A. I expect to get the usual commission.

The Referee: There has never been a sale, never has once a Trustee in Bankruptcy sold anything except on a broker's commission. That is customary in this court. [118]

Mr. Cahill: That is all.

Mr. Lynch: The Trustee has nothing more at this time.

The Referee: We will recess to 10:00 o'clock a. m., Wednesday.

(Whereupon a recess was taken to the hour of 10:00 o'clock, Wednesday, November 26, 1947.) [119]

Los Angeles, California, November 26, 1947.

10:00 A. M.

Mr. Cahill: We do not have Mr. Carrey here, and that being true, I would like to place into the record the data set forth in a letter from Mr. Carrey to me which counsel will stipulate to that Mr. Carrey will have testified.

The Referee: Had he been present.

Mr. Cahill: Should he have appeared at this time.

The Referee: All right.

Mr. Cahill: I think I will have to read it into the record. The data I am about to read is contained in a letter of Mr. A. A. Carrey.

Mr. Lynch: In order to save time why don't you introduce it and we will stipulate that it may be written up by the reporter?

The Referee: I would like to hear it now and know what it is.

Mr. Lynch: All right.

The Referee: It may influence me one way or the other.

Mr. Cahill: Mr. A. A. Carrey, Petroleum Geologist and Engineer, 529 East Roosevelt Road, Long Beach, California. The letter is dated November 17, 1947:

"Mr. L. M. Cahill, Attorney-at-Law,

"606 South Hill Street,

"Los Angeles, California

"Dear Mr. Cahill:

"The petition of H. F. Metcalf, Trustee, for [120a] the sale to the Procter & Gamble Manufacturing Company of certain properties located within the

Wilmington oil field has been brought to my attention. Said property is owned by the F. P. Newport Corporation and is at present leased and operated for oil by the Universal Consolidated Oil Company.

"I have been requested to study said petition and render any opinions that I might have insofar as said sale might affect the present and future economical operations of the wells now located on the property.

"I shall only attempt to base my opinion upon good oil field practice and the matter of operating leases. By way of qualification I might state that I have been actively interested in the oil business for 25 years, as a consulting petroleum geologist and engineer for 20 years, and more particularly I have been the field agent for the trustee, Mr. H. F. Metcalf, in connection with this particular property for approximately nine years.

"As a result of that experience I have had occasion to study the original lease many times and feel that I am familiar with the operations insofar as they affect this particular property. [121]

"From a study of paragraph B of the above-mentioned fee, it appears to me that the sale of this property would change the present landowners' position in that the Newport Corporation would be the owner of a so-called 'over-riding royalty,' rather than as present they are the owners of the mineral interest. Said sale would in a sense convert present oil and gas lease into a restrictive lease, in which case the termination period would be of prime importance. Such a restricted lease might preclude

the possibility of the Newport Corporation operating the wells themselves some time in the future.

"In explanation of the above statement, it will undoubtedly come to pass some time in the future that the present operating company might feel that it is no longer profitable for them to operate under said lease. In such cases it has been found that the fee owner can often operate such leases where an operating company, which has to pay high royalties, cannot do so.

"It is my opinion that if this sale is made that the present landowner, the F. P. Newport Corporation, will suffer a decided loss in the sale value of their landowner's interest. It has been my experience that there are few buyers [122] for over-riding royalties, as most royalty buyers prefer mineral interests. In each case where I have observed sales, it has been my experience that over-riding royalties always bring considerably smaller prices than landowner's royalties or mineral deeds.

"I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is in the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has no power to prevent the present operating company from terminating said lease, and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.

"In answer to paragraphs C and D, I do not believe that the changes in the physical equipment on the leases particularly work any hardships on an operating company. It may to some extent limit

their freedom in the matter of remodeling work and the handling of oils from the various wells, but I do not believe it will be serious enough to cause too great inconvenience.

“Hoping the above information will be of some assistance in clearing up some of the points in connection with said sale, I remain, [123]

“Very truly yours,

(Signed) “A. A. Carrey.”

I will ask counsel to stipulate and I offer to stipulate that if Mr. Carey were called at this time, sworn and testified as a witness, that he would testify as set forth in this letter.

Mr. Lynch: I so stipulate.

The Referee: That is the man who has been supervising the oil there month by month, isn't it?

Mr. Cahill: Yes, your Honor.

The Referee: And for whom I have counter-signed checks for \$240?

Mr. Cahill: Yes, your Honor. His reports are on file here and they have been for many years.

The Referee: I recall.

Mr. Cahill: He is the geologist who rendered the services.

The Referee: I was just curious to know whether it was the same Mr. Carrey.

Mr. Cahill: Yes, he is, your Honor.

Now, having in mind what Mr. Carrey said with reference to the lease, I think it would be very appropriate to ask for a stipulation by counsel concerning the lease which provides in paragraph 13 thereof as follows:—

Mr. Lynch: Let's not stipulate on that, Mr. Cahill. I wanted to introduce this lease anyway and I think probably [124] this is the proper time to do it. This lease was made and entered into by and between H. F. Metcalf as trustee in bankruptcy and the Universal Consolidated Oil Company, introduced by reference, copy of the lease being attached to the petition filed in this matter in these proceedings on the 14th day of January 1938 by H. F. Metcalf as trustee in bankruptcy and the Security-First National Bank of Los Angeles, the petition being for approval and authority to execute said lease, and a copy is attached to that petition.

Mr. Cahill: That is agreeable.

Mr. Lynch: As exhibit next in order. Then if you want to comment on it it is all right.

Mr. Cahill: I might call the attention of the court to the fact that the lease contains 21 paragraphs and that there are one or two paragraphs which are extremely pertinent to the matter under discussion; one of which is paragraph 13 composed of two sentences entitled "Uses of Premises by Lessors."

"The Lessors and each of them shall have the right to gauge all production hereunder and to use the surface of the demised premises, (where they have the right now to use the same, respectively), for any purpose or purposes not inconsistent with the rights of the Lessee hereunder, and to such an extent as will not unreasonably interfere with such rights of the Lessee hereunder, in- [125] cluding the right to develop or to cause to be developed any sand or zone in the demised premises, the right to develop which has been lost by the Lessee. The Lessee agrees to conduct its operations hereunder so as to

interfere as little with such use by the Lessors, respectively, as is consistent with the economical operation of the property for the development and production of oil, gas and other hydrocarbon substances therefrom and thereon."

Paragraph 15, if your Honor please, is entitled "Forfeiture," and it is composed of apparently one long sentence, as follows:

"In the event of any breach of any of the covenants, terms or conditions of this lease by the Lessee, other than one of those mentioned in Paragraph 29 hereof, and the failure of the Lessee to commence in good faith to remedy the same within 30 days after written notice from the owner or owners of the demised premises so to do, or if the Lessee shall fail to diligently prosecute its efforts until such default has been fully remedied, then, at the option of such owner or owners, this lease shall forthwith cease and determine, and all rights of the *Less* herein and hereunder shall be at an end; provided, however, that notwithstanding [126] any such forfeiture of this lease for any cause other than one of those mentioned in subparagraphs (a) and (b) of Paragraph 29 hereof the Lessee shall have the right to retain any and all wells then being drilled or which may then be producing oil and/or gas in paying quantities, together with the aforesaid easements and appurtenances of said wells, in so far as reasonably necessary for the operation thereof, and sufficient land surrounding each well for the operation thereof. The land so retained shall be subject to all of the terms and conditions of this lease."

I also wish to refer your Honor to the clause with reference to the surrender of the premises which is paragraph 21, reading as follows:

“Upon the expiration of this lease or its sooner termination in whole or in part, the Lessee shall surrender the (163) possession of the demised premises or the affected portion thereof to the Lessors, and shall deliver or cause to be delivered to the Lessors a good and sufficient reconveyance thereof. Within 30 days after such expiration or termination, the Lessee shall, (subject to the rights and privileges granted the Lessee and the Lessors, respectively, hereunder), [127] remove from such premises as to which this lease is so terminated, all of its rigs, machinery and other property, and shall fill all sump holes and other excavations made by it.

“Right to Quitclaim.

“At any time after the Lessee has drilled the first or any subsequent well upon said demised premises to the depth required by Paragraph 3 hereof, if such well or wells be incapable of producing in paying quantities, the Lessee may quitclaim the demised premises, or the parcel thereof upon which such well may have been drilled to the Lessors, and thereafter the obligations of the Lessee hereunder shall cease as to the premises or parcel so quitclaimed; provided further, however, that the quitclaiming of either of said parcels without the other shall have the same effect and be accompanied by the same results as if the same had been forfeited under Paragraph 15 hereof, but the quitclaiming of the entire premises, whether accomplished by one or two deeds and whether accomplished at the same or different times,

shall operate to deprive the Lessee of all of its rights hereunder, except the right to remove its equipment as provided in Paragraph 14 hereof, subject to the rights of the owner or owners as in said last mentioned paragraph set forth.” [128]

Those are the matters I desire to direct your Honor’s particular attention *ot*, and in view of the fact that there are exceptions mentioned in paragraph 15 as to certain matters in paragraph 29, while it is not important we should read it. Paragraph 29 is entitled “Forfeiture for Failure to Drill or Pay Royalty.”

“(29) (a) If the actual drilling of the first well herein provided for has not been commenced within the time herein first provided for the commencement thereof, (unless excused from so doing under Paragraph 5 hereof), this lease shall, at the option of the Lessors, automatically cease and terminate, unless prior to such default the time for the commencement of the drilling of such well shall have been extended by the written consent of the Lessors herein. No such extension shall be granted without the payment in advance by the Lessee of an additional sum of money to be mutually agreed upon and paid at the time of the granting of any such extension, nor shall anything in this paragraph contained be construed as giving to the Lessee any right to demand or receive any such extension.

“(b) The failure to pay any rental or royalty payable by the Lessee hereunder within the time

herein provided therefor and for 10 days after receipt [129] of written notice of such default given by the Lessors herein shall operate, at the option of the Lessors, to forthwith terminate all of the rights of the Lessee hereunder in and to the demised premises or the portion thereof as to which such default may exist, unless such payment has been excused or prevented by operation of law or by the courts in the enforcement thereof."

Paragraph (c), your Honor, says that "Time is of the essence," and so forth and so on. It is a long paragraph but I don't think it is particularly pertinent to the matters that I have to call your Honor's attention to.

In the absence of Mr. Carrey I am going to do the best I can and recall Mr. Mead to testify on a different matter other than the matter he testified to the other day.

The Referee: All right.

Mr. Lynch: At this point, if counsel is agreeable, and the court rules, I would like to introduce by reference the agreement with the City of Long Beach relating to this particular property, a copy of the agreement being attached to the petition, for an order authorizing H. F. Metcalf, trustee, to execute a certain agreement with the City of Long Beach, which petition was filed in these proceedings on September 12, 1938. May that be Trustee's next in order?

The Referee: That is the agreement with the City of Long Beach. Very well. This gentleman is still under oath. He appeared here the other day as a witness. [130]

ROY G. MEAD,

called as a witness by and on behalf of the Objector, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Cahill:

Q. What is your name, sir? A. Roy G. Mead.

Q. You are the Mr. Mead who heretofore testified in this proceeding? A. Yes, sir.

Q. Your qualifications were then stated?

A. They were.

Q. Mr. Mead, during this proceeding we had testimony from witnesses other than yourself concerning a Well No. 6 now situated on this six-acre parcel, and at least some statements by counsel, if not evidence, that that well had been deepened by the present lessee, The Universal Consolidated Oil Company, to a certain depth—I think Mr. Metcalf gave the depth at approximately 6,000 feet—and also there was a statement, I believe, that an electric log had been prepared and was somewhere available as to that particular well and as to the portion that had been deepened.

I will ask you at this time, Mr. Mead, whether an electric log has been presented to you in reference to that well.

A. Yes, it has. [131]

Q. Have you had occasion to examine it?

A. I have.

Q. Do you have it with you? A. I have.

Q. Does it disclose the drilling of that portion of the well which we might refer to as the extended portion, the portion that has been described here as an attempt to go down to the Ford zone?

A. It does.

(Testimony of Roy G. Mead)

Q. Have you reached any conclusion from an examination of that electric log whether the Ford zone underlies this particular property, at least in so far as the area concerning the sixth well is concerned?

Mr. Lynch: Don't you think we should have that log in evidence?

The Referee: I would like to have someone tell me what an electric log is.

Mr. Cahill: I will show you one now, your Honor.

The Referee: I have seen them drill all kinds of wells but I never knew anything about an electric log.

Mr. Cahill: I will hold it up so that your Honor can see the whole thing before you.

The Referee: Does that have any particular virtue over coredrilling?

The Witness: It has, your Honor.

The Referee: When you drill a well you drag up a core [132] from *time and* from that you geologists determine what might or might not be there, a thousand feet or so ahead of it, is that true?

The Witness: That is true.

The Referee: How does an electric log differ from a core?

The Witness: A core that you obtain is a physical part of the formation that is penetrated and is something which you can examine.

The Referee: I understand.

The Witness: An electric log is a log that is made by running an electric current down the well and you measure the resistivity of the electric current, and the potential of the electric current, the data you get is recorded by an instrument on a film and that is then reproduced on

(Testimony of Roy G. Mead)

paper. It makes a curve and from the curve you can determine whether you have shale or sand. If you have a sand in which oil occurs then the markings made by this electric log indicate whether it has water or oil. So that an electric log is more important than a core because you can tell whether there is water, whereas with a core analysis you cannot always tell the water.

The Referee: Does this electric log tell you when you hit oil or does it tell you when you hit water?

The Witness: In connection with geologic evidence, yes. For instance, here is a portion of the electric log which [133] shows production from the sand that they are now producing from. It is the 'Terminal Zone. On the right-hand side you will note—it is called the self-potential part of the curve. The curve has markings like a saw-tooth that extend outward. On the outward side the same points that extend to the right also extend to the left. That indicates the formation shown in that interval is productive of oil. The depth is shown on the left-hand *size* in figures showing the depth from the surface to the different intervals in the well.

There is a red portion of the log. That indicates the well—the lower part of that is marked off in red which means they plugged off that part of the well and cannot produce below the top of the point which is 4117 feet. Production on the left-hand side doesn't go over to the right. The projections on the right-hand side are irregular and do not extend out as far as production is concerned.

There is a third curve which has a dotted line and does not project to the right at all which indicates water. If this third curve would project over this dotted curve that

(Testimony of Roy G. Mead)

would indicate there was no water in the sand and for that reason they plugged that portion of the well off.

As you go down further on the log—it is already drilled on down to the lower zone, the Ford zone—as you go down further in the well there is a point here I have marked as AA called the marker point, as the point which cor- [134] responds with other logs which have been drilled in the area. That is the top of the upper zone. I arrived at that by a knowledge of the field and other electric logs, stand-in logs. The State of California publishes such a log. It is called a composite log of the area.

Mr. Lynch: What distance is that down?

The Witness: That distance is 3200 feet. Then there is another point down there marked A. V. which is the top of the lower Ford zone. I put those marks on there when I examined this log and compared it with the composite log. In the upper Ford zone there are some points that have water and some that have oil. This part along here on the left-hand side which does not show any noted jagged lines—it is mostly straight—indicates that that part is shale. It would be non-productive because oil is only produced from sand.

When we get down a little bit further, at about 5375 feet or 5350 feet, you will note that the projections to the right of the heavy line and then the dotted line—well, that indicates water. I presume Mr. Carrey has marked on there that that is water. That is correct.

Below that there is another point about 5380 feet—each one of these lines is 10 feet for the projection is quite strong to the right, and the dotted curve is also strong to the right. On the opposite side the other curve

(Testimony of Roy G. Mead)

is to the right. That indicates oil. Mr. Carrey indicated [135] that as being oil.

Then at about 5400 feet, a little further, there is water. Below that, at 5420 feet it shows water and the curve indicates it.

From that point on down all of the curve is quite strong to the right.

On the left-hand curve, the resistivity curve, all of that curve would indicate it is productive and has no water. If they were going to run a pipe in this hole in order to produce that they would run the pipe into the hole, a pipe with no perforations in it, and then they would perforate the portions that show there is oil in it. The portion shown as water would be left blank. They would run cement in up there first so that nothing would go into it and then they would put an instrument that shoots a bullet through the casing and formation and make the hole, and they perforate in that way all portions showing oil. The portions indicated as water from the electric log—usually they have a core sample to go by, too—they leave that blank so that they can produce a zone that is water and oil or all oil.

In my opinion this well could have been produced had it been completed in that manner.

The Referee: Am I to understand in the well that the hole was drilled down to that depth?

The Witness: Yes. This well was drilled down 5918 according to this electric log, but it was later plugged [136] back. They evidently plugged it back to 4117 feet and produced from the interval between 3958 and 4117 feet.

(Testimony of Roy G. Mead)

By Mr. Nelson:

Q. Mr. Mead, is it common oil field practice of the oil companies to take electric logs of wells they drill?

A. They always do that. Every operator takes a check of the well, makes an electric log, and usually they take cares, too. When they finish drilling as deep as they want to go, they run an electric log, but meanwhile they have taken the cores as they have drilled.

Q. The resistance of oil to the electric current is what makes these longer projections, is that right?

A. That is right. Salt water is a conductor and oil is not. That is how they arrive at this figure. It is a very complicated and technical theory about electric logs. They are used universally by every company that I know, and their engineers interpret the logs.

The Referee: What am I to understand about the failure of this company to strike oil at that depth of 5200 odd feet? That was due to what?

The Witness: That I don't know, your Honor. I know if I were the engineer for this company I would have recommended that that well be produced by running a casing in the well, cementing it and perforating on the points on the electric log. That indicated an attractive oil sand.

Q. By Mr. Nelson: Having drilled into that zone, the [137] fact is that they did not actually test the well. They did not get a flowing well, but after taking the log they did not run a casing to make a test?

A. Undoubtedly that is the case, but I don't know anything about the history of the well.

(Testimony of Roy G. Mead)

Q. You *don't anything* about their motives?

A. No, but I do know from the study of geology of that area that the Ford zone underlies the particular portion of the field that this well penetrated.

Q. The Ford zone has been very productive in other areas some distance from this?

A. Yes. There were some 75 wells produced from the Ford zone in what is called Block Four which this well enters. There are several faults in the field which cross the field north and south and divide it into blocks. Those fields hade to the east and between each field is a block. Between the Harbor fault going under this property, and the next field to the west, the Edison fault, is what is called Block Four. Block Four has some 78 producing wells from the Ford zone.

Q. When you say the fault hades to the east you mean it inclines?

A. Yes, it inclines to the east about 20 degrees from vertical.

The Referee: That fault prevents the flow of oil past the barrier or whatever it is underneath? [138]

The Witness: In the case of the Wilmington Field, all of those faults form a barrier from one block to the next. I have a little diagram which might show your Honor what a fault is.

The Referee: I have had some experience with water in San Bernardino County so I know something about faults.

The Witness: I made a little diagram here which will show you what I mean.

Mr. Lynch: Before we get to discussing any diagrams in the record and so that we will be clear what the witness

(Testimony of Roy G. Mead)

has been testifying about, don't you think that log ought to be put in? Otherwise, his testimony is meaningless because he has referred to it so much.

Mr. Cahill: Yes. We offer the log in evidence.

The Referee: All right.

Mr. Nelson: Who is offering it?

Mr. Lynch: It is immaterial whose exhibit it is. He is your witness.

Mr. Cahill: Before we offer it, your Honor.

The Referee: It will be marked next in order.

Q. By Mr. Cahill: The witness was about to give us one of the simplest demonstrations I have ever seen to explain what a fault is and how it affects the oil zones.

A. I have a cardboard here. The place where I have cut represents the fault. That is approximately the slant of the fault. The slant is the hade of the fault. Those [139] straight lines across the diagram marked in green and red represent the position of the zones before the fault took place. That is the position that the sediments were originally laid down in. Then there was a disturbance by the movement of the earth. The block on the east side of the faults moved down. That is true of every one of the blocks there. This moved down about in this position so all of those different zones were offset one with the other.

On this particular property—in order to get these zones straight and keep within their property lines—they had to divert the wells over by slant drilling in order to hit different zones and keep within property lines.

The two lower red lines indicate the Ford zone. After this had taken place the Ford zone was shifted over and the fault became sealed so that the portion of the zone

No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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of F. P. Newport Corporation, Ltd., Bankrupt, DOR-
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OLSEN, WILLIAM H. NEBLETT, MRS. F. P.
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PORT CORPORATION, LTD., RUBY E. NEB-
LETT, SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES and JOSEPH SATTLER,
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TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 209 to 425, Inclusive)

Upon Appeal From the District Court of the United States
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AUG 28 1948

PAUL P. O'BRIEN,



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(Testimony of Roy G. Mead)

between this field which is the Harbor fault, and the next one to the west, the Edison fault, was sealed in and the oil couldn't get out. It was held right there.

Q. By Mr. Nelson: If there was a deeper zone, the point of penetration would be farther from the fault line than in the upper zone?

A. Yes. In my opinion there is another zone called the 237 zone which might be called the lower part of the Ford zone. That zone is also productive in Block Five to the west of this property.

Q. Logs have been brought in in that zone? [140]

A. Yes.

Q. What is the nearest one?

A. The nearest one is a couple of hundred feet away.

Q. You don't mean 200 feet from this property?

A. It would be about three or four hundred feet to the west. There are a number of wells I don't remember the location of but I think we have a map here showing that, with the lower zone wells marked on that.

Mr. Cahill: Let me clear that up.

Q. At a distance as close as three or four hundred feet from the Newport property there are wells producing now from the Ford zone?

A. There are wells producing now from the Ford zone, that is right on the west.

Q. Is that one of the factors that led you to the opinion that the Ford zone underlies this six-acre parcel?

A. Well, in a way, yes. My reason for believing the Ford zone underlies that is purely geological, based on information obtained from various parts of the field and from this electric log that you have just introduced in evidence.

(Testimony of Roy G. Mead)

Q. What is your opinion, Mr. Mehde, as to the possibility of a still lower producing horizon known as the 237 zone underlying these particular lands?

A. In my opinion that zone does underlie this land for the reason that all of your formations are built up just like a layer cake. If you have a zone under one part of the [141] field that same zone will be under the other part of the field unless there has been an intervening fault to cut it off. In this case there has been no intervening fault to cut off the intervening zones. The only thing is that portions of the zones to the east of the various faults, particularly the Harbor fault, are those that contain water and not oil; but the zone could go under all of this property and each of the faults might not be productive.

Q. Is the 237 zone where it has been produced in the area productive of oil?

A. Yes. There are some 20 wells producing from the 237 zone in Block Five.

Q. That is sometimes referred to erroneously as the Schist zone, isn't it?

A. Yes. That is referred to as the Schist zone. The reason it is called the Schist zone is because there is some similarity between the schist-producing zone in the Torrance area and the Wilmington area. There is a formation called the nodular shales which is encountered just above the Schist zone and this 237 zone includes a portion of this nodular shale and some of the underlying schist. The underlying schist is basement rock.

(Testimony of Roy G. Mead)

Q. Does the electric log of Well No. 6 show that the Universal Consolidated Oil Company drilled it to a depth sufficient to penetrate the 237 zone?

A. Yes. In comparing the depth at which the 237 zone [142] was encountered in other areas down there, I am of the opinion that that probably hit the top or upper portion of the 237 zone in the No. 6 well.

Q. But did not penetrate into it?

A. No, I don't believe it penetrated it.

Q. You then conclude of necessity in answer to the last question that they did penetrate the entire Ford zone?

A. Yes, they penetrated the upper and lower Ford zone.

Q. What has been the production on these 20 wells in the 237 zone in barrels per day, approximately?

A. I don't carry that in my head. It is around 160 barrels. There were 20 wells producing from the Ford zone. They are perhaps averaging a daily production of 161 barrels as of January 1, 1947. Some 78 wells producing from the 237 zone have for an average daily production 283 barrels. Of the Ford zone, of the 20 others producing from the Ford zone, 9 were flowing, and of the 78 wells producing from the 237 zone as of January 1, 1947, 75 were flowing.

Q. You mean barrels per well when you state that?

A. Barrels per day per well.

Q. Some of those wells have been producing for quite a number of years, particularly from the Ford zone, is that right?

A. I believe in that particular area the Ford zone was not producing until after the war. I think along about 1945 [143] or 1946 they started to take produc-

(Testimony of Roy G. Mead)

tion from the Ford zone. Prior to that time there was an agreement among the operators to not develop that zone in that particular area.

Q. You want the court to understand, Mr. Meade, it is your position that the Ford zone does underlie this six-acre parcel?

A. Yes, that is definitely my opinion.

Q. Also that there is a possibility that the 237 zone underlies this particular parcel?

A. Yes, the 237 zone undoubtedly underlies the property. Whether or not it is productive is something I would not be able to say until after an electric log was run, but I have no reason to doubt but what it would be productive.

Q. Are you of the opinion from the information you have that the Ford zone is productive there?

A. Yes, I am definitely of the opinion that the Ford zone is productive.

Q. On these lands under the six-acre parcel?

A. The portion to the west of the fault—the fault crosses under this property and there would be a portion of this property in which you could not encounter the Ford zone.

Q. What portion is that, approximately, Mr. Meade?

A. That would be the portion of Parcel No. 2, a part of that. I don't know just what the flow of the fault would be without further study, but if you had to drill slant [144] holes or deepen these holes by continuing on down by slant drilling you would cross another property and be under Parcel No. 1. If arrangements were to be made to get a right of way through that property, then you could produce from the wells drilled on Parcel No. 2.

(Testimony of Roy G. Mead)

Q. Can you produce from the Ford zone here by straight drilling?

A. Well, not from Parcel No. 2. It is on the west portion of the property that you would encounter the Ford zone.

Q. In the westerly portion of the six acres could you produce by straight drilling there?

A. No. I believe that the wells might have to be deflected slightly to the west.

Q. Could that be done without going through anybody else's land?

A. Yes, and could be within the property limits. Wells Nos. 1, 2 and 3 would offer no problem whatever to producing from the Ford zone by continuing on down straight. The other wells might have to be slant wells.

Q. You are of the opinion this Well No. 6, based upon an examination of the electric log, would have been a profitable producing well?

A. From my examination of the log I see no reason. If I were an engineer I would have recommended that the well be completed according to good oil well and oil field practice [145] and would have been a producer.

Q. Do you know whether it is almost universally regarded among oil companies and oil producers that the data on these electric logs, while not regarded as infallible, is regarded as experimentally reliable? Is that correct?

A. Yes. Among operators throughout the world the electric logs are considered reliable data.

Mr. Cahill: Thank you very much, Mr. Meade.

(Testimony of Roy G. Mead)

Cross Examination

By Mr. Lynch:

Q. Did you ever examine the Universal Consolidated Oil Company's production log on this well?

A. You mean their report of production?

Q. Yes. A. No, I haven't.

Q. Are you aware of the fact that a production test was run on the deep well No. 6?

A. No, I don't know that.

Q. You made no inquiry from them as to the results?

A. No, I did not.

Q. You do know, of course, that the Universal Consolidated Oil Company has been in business for a great many years?

A. Yes. They are considered a good operator.

Q. They are considered one of the best operators in the field, are they not? [146]

A. Well, I am not in a position to say whether they are best or not.

Q. I don't mean the best. I don't want you to say whether or not they are the best, but they are considered among the best operators in the field?

A. They have a good engineering staff. They drill some poor wells and they drill some good wells.

Q. You are aware of the fact, of course, that the Universal Consolidated Oil Company is in business for the purpose of making a profit?

A. That is true.

(Testimony of Roy G. Mead)

Q. If they found production in this lower well No. 6, as extended, they would have produced it, isn't that a fair statement?

A. I don't know what the policy of Universal Consolidated or any other operator might be so I wouldn't say.

Q. Your testimony as to whether or not this well could be produced is purely a hypothetical conclusion reached by you as a result of examining the electric log without knowing any of the actual operation experiences or production experiences, is that true?

A. My opinion is based on a knowledge of the geology of the area and what I saw on the electric log.

Q. In other words, the electric log may show oil in a particular area but it doesn't demonstrate in any wise the quantity of that oil, does it, or water, and whether or not [147] it would be economically profitable to develop it?

A. Well, an electric log does not—there isn't any instrument that will tell the quantity, but from experience in looking at an electric log, and from production tests afterwards, you could form some opinion in a particular area of what kind of a well you are going to get from the appearances of the log.

Q. I am assuming, of course, that your testimony here is given in good faith, Mr. Meade. I assume you would be perfectly willing during the noon recess to go over and talk to Mr. Williams or some other engineer about the production on this well. Would you do that?

A. Would I talk to them?

(Testimony of Roy G. Mead)

Q. Yes.

A. Well, I wouldn't have any objection to talking to them.

Q. Would you undertake to do that?

A. Undertake to do what?

Q. Undertake to talk to them. I think you would like to straighten yourself out as to what happened in relation to this well. Now the fact is that there was not production sufficient from that lower zone to make it economically profitable to develop it. Would you care to go over and talk to them about it?

A. I wouldn't have any objection to finding out what the results were. I would be glad to do that. As I stated, [148] I would have recommended, from what I see on the electric log and from my knowledge of the geology of the area, I would have recommended that the casing be run in the well and be perforated on the points indicated on the log as desirable.

Q. I know that, Mr. Meade. And I think undoubtedly you recognize that no engineer, unless he knows what the production results have been and what the production runs show, is going to make any recommendation to an operator as to whether he shall or shall not develop it. Isn't that true?

A. He is called upon to make recommendations to the operator on the basis of the information that he has.

Q. What I want to know, Mr. Meade, is this. Did I understand that you are willing to tell this court that you would make a recommendation to the operator to develop a particular zone without knowing what the production experience or run tests on that well are?

(Testimony of Roy G. Mead)

A. Well, I think we are a little confused there. If I were the engineer for the operator and they drilled in that area and got a log such as the log that we have here, not having any other adverse information, I would recommend it.

Q. You would ask to have a production test, wouldn't you?

A. They make a production test but sometimes a production test isn't conclusive. For instance, if you have—

Q. Oh, well—

A. —sections in the zone that have water in them, [149] such as this one has, a production test might not be conclusive, unless in making the production test they exclude the portions that have water and test only the portions that have oil.

Q. Have you made any geologic survey of this property to determine where the fault is in relation to it?

A. Only such information as is known generally from the wells which is common information.

Q. Have you examined the log on any wells other than No. 6? A. On this property?

Q. Yes.

A. Well, I have looked at all of the electric logs.

Q. On this property?

A. For the wells drilled on this property.

Q. You have looked at those electric logs, all of them?

A. To their present producing depths.

Q. Having examined the electric logs on this property—and I assume you have examined electric logs on what is known as the three-acre parcel—can you tell us now which side of the faults these wells lie on?

A. Which is the three-acre parcel?

(Testimony of Roy G. Mead)

Q. The three-acre parcel is the one adjacent to the Southern Pacific property.

A. As I understand it, this property is divided into [150] two parcels, Parcel No. 1 and Parcel No. 2, with an intervening piece of property between.

Q. That is right.

A. Owned by another person or under other ownership.

Q. That is right. There is a six-acre parcel and a three-acre parcel.

A. The six-acre parcel is parcel No. 2, isn't it?

Q. Well, I don't know—yes. Parcel No. 2 is the six-acre parcel and Parcel No. 1 is the three-acre parcel.

You have examined the electric logs on the wells on Parcels No. 1 and No. 2?

A. That is right.

Q. You made an examination of the electric logs of those wells on those two parcels. On which side of the fault do these wells lie?

A. The collar of the holes are on the east side of the fault.

Q. How about the wells on the No. 1 parcel?

A. Well, all of those wells start on an area that is on the east side of the fault and bottom on the west side of the fault.

Q. In that area there is very little production from the east side of the fault, isn't that true?

A. There is no production—there is production in the upper zone called the Ranger zone on both sides of the fault, and in the Terminal zone there is no production on the [151] east of the fault.

Q. In relation to Well No. 6 where does it bottom? On which side of the fault?

(Testimony of Roy G. Mead)

A. Well, I haven't seen the survey of that well.

Q. You have not seen the survey of the well, nor have you—

A. But it would bottom, in my opinion, on the west side of the fault because it penetrates the Terminal zone on the west side of the fault.

Q. But you have not examined the survey so you don't know where it bottoms?

A. No, I haven't examined the survey.

Q. Would you undertake to do that during the noon recess?

A. Well, I have examined the survey that has been plotted on Mr. Carrey's report.

Q. For your information, Mr. Carrey's report of these wells has been filed in this proceeding. Have you examined that report?

A. Well, I examined a report that Mr. Carrey prepared for Mr. Newport. I don't know enough about this case to know whether—

Q. Do you have that report with you?

A. It is in the court room.

Mr. Lynch: Mr. Cahill, do you have that report?

Mr. Cahill: I have a copy of it here. [152]

The Referee: Is there any provision in this lease which requires the lessee to go down to the Ford zone?

Mr. Cahill: Yes, your Honor. There is a provision, if it is discovered or determined that there are productive zones, and the lessee fails to go down and produce those zones after demand, that the lessor has the option or right to produce those.

(Further discussion omitted and the matter was then continued to 10:00 o'clock a.m., December 1, 1947.) [153]

Los Angeles, California, December 1, 1947, 10:00 A.M.

The Referee: All right, gentlemen, let's proceed.

Mr. Lynch: We have the vice-president from the Universal Consolidated Oil Company here. If the Court has no objection and if counsel is willing we would like to put him on out of order so that he may be relieved and dismissed.

Mr. Cahill: I have no objection, but before he is called I would like to read a part of the lease to Your Honor, the lease being in evidence. I read several paragraphs before and I thought the Court should be acquainted with it as we go along.

The Referee: Very well.

Mr. Cahill: I desire to read from page 4, the paragraph entitled, "Full Development Clause" as follows:

"Unless excused from so doing under Paragraph 5 hereof (anything herein elsewhere to the contrary notwithstanding) the Lessee agrees, while operating hereunder, to properly produce all available oil, gas and other hydrocarbon substances from the demised premises, (or any portion thereof held by the lessee), and to properly exploit, develop and protect the minerals and mineral rights in the demised premises, (or in any portion thereof held by the lessee), subject in each instance, to [154] legal restrictions and to any regulations imposed by governmental authority or any other matters over which the Lessee has no control. For a failure of the Lessee, when reasonably necessary and proper so to do, develops any known commercially profitable zone or stratum the Lessor may forfeit the right of the Lessee to develop and pro-

duce any such zone or stratum or any zone or stratum below any depth from which the Lessee may then be producing on said premises, or the Lessors may pursue any other remedy given them by law hereunder.”

Also, before we proceed, I would like to make this statement in reference to what Mr. Lynch said at the last hearing—not answering Mr. Lynch in any way, but just an observation—we called an expert, Mr. Meade, for the primary purpose to render expert opinion as to whether underlying these lands in question were one or two horizons that have not been produced from, the Ford Zone or the 237 Zone, or both of them. The witness rendered his opinion regarding that point. He was asked by myself or someone else to state his reasons and he stated many reasons. I thought in passing, and only in passing, he made this statement to Mr. Lynch as taken from the viewpoint that does not concern the Objectors here at all, he said if he had been the petroleum engineer on the well he would have recommended production tests on Well No. 6 and be produced. Now, whether Well No. 6 should [155] be produced is no part of the case here. It is simply a statement that the witness made in passing in support of his opinion. As far as we are concerned it is not a point at issue whether Well No. 6 should have been produced heretofore or not. It is not a matter in the case so we might avoid possibly putting too much time on that particular point.

I understand that Mr. Follansbee is here and he might be very helpful in giving his opinion as to whether the Ford Zone or the 237 Zone or both of them have any possibilities.

Mr. Lynch: I am in agreement with Mr. Cahill in one respect: The question of whether or not this particular well should have been put on production on the deeper zone is not involved in this proceeding. However, one question is involved in this proceeding and that is whether or not there is any production to be had from that lower zone. It was the information of the Trustee and it was the information of his counsel that this particular Well No. 6 had been developed and drilled into that zone, and that production from that zone under this property was found to be not commercially profitable. Consequently we have felt that there has been an exploration of that zone and a determination that it is not a profitable venture. The Trustee is not in any wise concerned in an effort to force this sale. If it is the conclusion of this Court that there [156] may be a zone that can be profitably developed then I think, as I stated at the conclusion of the last hearing, that this sale should not be made because I think it should be made clear so that there will be no misunderstanding that if this sale goes through the right to develop any such zones, unless the Universal Consolidated Oil Company does it itself, is lost to this estate. In other words, if the Universal Consolidated Oil Company refuses to develop a zone which they think is unprofitable, or for any other reason, this right to which counsel has referred of forfeiture is lost to the estate; that passes to the purchaser. We would not be able by reason of any such failure on the part of the Universal Consolidated Oil Company to forfeit the lease in that respect and drill any wells or cause them to be drilled.

The Referee: Do you want to put the witness on and hear what he has to say?

Mr. Lynch: Yes, Your Honor.

The Referee: My recollection is they drilled into the Ford Zone and failed to find oil there in profitable quantities.

Mr. Lynch: That is the information that the Trustee and his counsel have had, and Mr. Follansbee can tell us about that.

The Referee: Let's find out from someone who drilled it and who knows something about it. [157]

G. F. FOLLANSBEE, JR.,

called as a witness on behalf of the Trustee, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lynch:

Q. Mr. Follansbee, will you please tell us your full name? A. G. F. Follansbee, Jr.

Q. You are an officer of the Universal Consolidated Oil Company? A. Yes, sir.

Q. What office do you hold?

A. I am vice-president.

Q. Are you also an engineer, Mr. Follansbee?

A. Yes, sir.

Q. What experience have you had as engineer?

A. I was graduated from Stanford University with an A.B. in Geology. I took one year's graduate work in petroleum engineering. I spent 2½ years with the California State Division of Oil and Gas as an engineer. I have been 19 years with the Universal Consolidated Oil Company as engineer and geologist.

Q. Mr. Follansbee, you are familiar with what was done by the Universal Consolidated Oil Company in relation to the deepening of Well No. 6? [158]

A. I am.

(Testimony of G. F. Follansbee, Jr.)

Q. On what is known as the 6 acre parcel?

A. I am.

Q. Will you state what was done by the Universal Consolidated Oil Company in that respect?

A. In 1944 the well was deepened from approximately 4,100 to a depth of 5,918 at which point we estimated we were some 100 to 150 feet below the base of the Ford Zone. In deepening we took numerous cores from right below the old depth, right down to the bottom of the hole. We had some oil showing and in a zone from about 5,770 or 5,730 to 5,750 there was some fair looking sand which we were undecided upon at the time. After running the log, going over the thing and giving some consideration, it was my opinion that we could not get a commercial well in that lower portion of the Ford Zone. The well was then plugged back to the terminal zone and put on production.

Q. Did you determine to your own satisfaction from the examination of the log and the cores in the well that this zone was not commercially productive?

A. It was my opinion it would not be commercially productive in the Ford Zone. It was at that time and I think—

Q. You spent considerable money in deepening this well, did you?

A. It was a very expensive deepening job. [159]

Q. If in your opinion the well had been commercially productive or could have been made commercially productive you would have put it in production, I assume?

A. That is correct.

Mr. Lynch: That is all.

(Testimony of G. F. Follansbee, Jr.)

Cross Examination

By Mr. Cahill:

Q. Mr. Follansbee, Well No. 6 from the outset was a troubled well, was it not, from an engineering standpoint?

A. In what respect, may I ask?

Q. In the actual drilling didn't you experience difficulty in the drilling of it?

A. Not that I recall.

Q. Was it a slant hole? A. Oh, Yes.

Q. In reference to the top of the hole it bottoms where?

A. Down by the channel which would be approximately south.

Q. And approximately how far from true vertical?

A. That I couldn't say offhand. If you have a map here I could show you about where it is.

Q. I have the original chart here. I have Mr. Carrey's original chart or report here and I think the surveys are included therein. [160]

A. It would be in the neighborhood of from five to six hundred feet.

Q. From vertical? A. South.

Q. Can you tell from this survey, Mr. Follansbee?

A. I would like to correct that. It would not be that far, that is, 500 feet. It would be nearer 300 feet.

Q. 300 feet from vertical? A. Yes.

Q. And it bottoms somewhere close to Channel No. 3?

A. That is correct.

Q. On the original drilling do you now recall some difficulties in keeping that well in the course of the direction originally intended? A. No, I don't.

(Testimony of G. F. Follansbee, Jr.)

Q. Do you recall that that well was always the poorest producer from the Terminal horizons?

A. It was not a very good producer. Whether it was poorer than No. 7 I don't know.

Q. Do you recall whether in the opinion of yourself and the officials of the Universal Consolidated Oil Company at the time, that is, shortly after drilling, that there were certain technical matters which indicated that Well No. 6 was a long ways from a perfectly drilled [161] well—not that I am thinking of any engineering fault in the drilling, but certain problems that arose in the drilling? Do you recall any of the facts there in reference to that well?

A. No; only the fact in the drilling we didn't get it right in that corner which would have been the best possible location. Mechanically it was slow.

Q. Wasn't there also some condition, Mr. Follansbee—I am trying to recall myself because I had conversations with Mr. Williams at the time—with the fault condition that sorely afflicted that well?

A. The original well?

Q. Yes, the original well.

A. Yes. There was only a very small portion of the Terminal Zone present under that 6 acre parcel of land on this well, and on No. 7 we were able to get only the lower portion, getting the lower Terminal Zone in the neighborhood of 140 to 150 feet.

Q. You have in mind the main fault? A. Yes.

Q. Was it not also true as to Well No. 6, as distinguished from any other well on the 6 acres, that there

(Testimony of G. F. Follansbee, Jr.)

was another fault condition, other than the main fault, that afflicted Well No. 6?

A. Not that we recognized.

Q. Directing your attention to the period of the [162] deepening which was in 1944, as I recall your testimony on direct examination you looked at logs from a depth of 5,730 and 5,750 feet and decided it was pretty good looking sand and it might pay to produce the well and then you ordered an electric log, is that right?

A. No. I didn't state that I thought it would be productive.

Q. No? A. No.

Q. You said it looked like pretty good looking sand?

A. It was fair looking sand.

Q. Yes. Now to follow that through you ordered an electric log, didn't you? A. Yes.

Q. After receiving the electric log and examining it you decided to the contrary, that the sand that apparently looked good at first did not look so good?

A. That is correct.

Mr. Cahill: If the Court please, the reporter has called my attention to certain exhibits put in so far, that while they have been admitted there is insufficient designation as to numbers or how they were to be marked.

The Referee: Yes. I put a question mark on that one.

Mr. Cahill: I don't recall the order in which they went in. The list shows eight exhibits marked Trustee's [163] Exhibits 1 to 8, inclusive. I am not advised as to how many Objectors' exhibits have been received as such.

The Referee: Suppose we solve the problem and mark it 00, Objectors' Exhibit 00.

(Testimony of G. F. Follansbee, Jr.)

Mr. Cahill: Will that number be given to the electric log?

The Referee: Yes, the electric log will be Objectors' Exhibit 00.

(The document was marked as Objectors' Exhibit 00.)

Mr. Cahill: Q. I wish at this time, Mr. Follansbee, to show you Objectors' Exhibit 00 and ask you to examine it and state if you know what it is.

A. This is the electric log on Newport 6 well.

Q. This is the copy of the log you have referred to in your testimony so far?

A. That is correct.

Q. This log was obtained by you and by your company for the purpose of aiding you in determining whether this Well No. 6 should be produced from the Ford Zone?

A. Yes.

Q. The one here in evidence obtains from markings that a previous witness testified indicated the possibility of oil in black; and certain markings in red indicated in his mind water.

Do those markings there generally speaking correspond with what your findings were at that time, in 1944? [164]

A. They don't.

Q. In what way do they not, Mr. Follansbee?

A. Confining this to the interval, let us say, from 5,670 down to 5,730, there were gray sands cored within the upper part of that interval. Those sands in my opinion would carry water.

Q. Core sands are usually sands that at one time have contained oil, is that right?

A. No, sir.

(Testimony of G. F. Follansbee, Jr.)

Q. They are not oil sands?

A. No, not normally.

Q. Are they essentially water sands?

A. Essentially, yes.

Q. What portion of the log there showed the gray sands?

A. Are we going to confine this to the whole thing?

Q. No. I would rather have you go through the areas marked where the witness believed there was existence of oil.

A. The first oil mark is about 4930 to -35. I had a core at 4930 to -32 which we recovered a foot and a half of oil sand with good odor in the top grading to a fair odor in the bottom. That is the only recovery of sand from 32 to 42 with a core of full recovery.

Q. The next point is where, Mr. Follansbee? It is down at a much greater depth, isn't it? [165]

A. It would be 5370 to -75. There were two cores: 5266 to -73. The first core, the recovery was 1½ feet of shale. And the core 5273 to -81 we recovered 5½ feet of shale with a few streaks of soft, fine core sand, and 4 inches of soft sticky gray ash. There was no cored oil sand in that interval.

Q. What is the next point on the chart?

A. 5490—45486 to 45491—recovered 2 feet of shale.

Q. Glancing at the log, Mr. Follansbee—pardon me, go right ahead.

A. And the core 5491 to 5496, recovered 2 feet 3 inches of shale, 1 foot 6 inches of oil sand, firm type of shaley brown, good odor and brown cut, fair saturation.

(Testimony of G. F. Follansbee, Jr.)

Q. These three points you just testified to on the log show on the log a small possible recovery as indicated in the markings?

A. I would say sand like that would definitely be wet.

Q. All three of those indicate very small possible recovery if there was oil sand there, just a few feet in between?

A. That is all, just a few feet.

Q. Now, do we approach next in order a point where apparently from the markings there should be a fair body of oil sand? [166]

A. This should be the main portion of the Ford Zone.

Q. Will you give me the top of that from the reading, please? A. It would be 5510.

Q. 5510 to where in the bottom? A. 5745.

Q. The markings on this log by the witness who preceded you, being made in pencil, indicates rather considerable oil sand in different sections between those two distances, a total of 13 I could there that are grouped relatively close together.

A. I wouldn't say that those represented oil sands.

Q. What do they represent in your opinion?

A. In my opinion that would be a water sand at 5510. 5610 is a doubtful streak. Streaks 5700 to 5720 look better on the log than on the cores. We did core some gray sands in that interval.

Q. Take the one just below the top there.

A. 5510—we had odor 5512 and 5522—a few small pieces of shale and oil sand.

Q. You had practically no recovery there?

A. Yes, we had practically nothing to go on there.

(Testimony of G. F. Follansbee, Jr.)

Q. When did you take your next core immediately following that? A. 5522 to -24, no recovery. [167]

Q. And the next one?

A. 5524 to 5530, recovered a foot and a half, one foot of oil sand, firm, fine shaley, grayish-brown, good odor and light brown cut; looks doubtful; and six inches of sandstone shale.

Q. The next group, three that are close together, in the pencil markings.

A. 5570 to 5600. 5574 to 5584, recovered 10 feet. 5 feet 8 inches was shale. 4 feet 4 inches of oil sand, soft, fine, shaley brown, with one inch streak of soft, fine barren gray sand six inches from the top, the remainder of sand has good odor and dark brown cut.

5584 to 5590 recovered four feet. Three feet of oil sand as above, six inches of sand hard to firm fine, gray grading to oil sand on bottom. Appears to be too hard and tight to carry fluid. Six inches of shale.

5590 to -96. Recovered 6 feet 6 inches oil sand, 4 inches of sand. Firm, friable, medium light gray fine. 1 foot 2 inches of oil sand, firm friable, medium shaley, slight oil odor and yellow cut. 6 inches of Siltstone. 1 foot 6 inches of oil sand, firm, friable, medium good odor and dark brown cut. 1 foot 6 inches of Siltstone as above.

Q. Where are we now on the log?

A. We are at 96 (indicating). 5596 to 5600. Recovered 6 feet 3 inches of Siltstone as above. 3 feet [168] 9 inches of sand firm, friable to hard, shale-like. Oil sand in top 1 foot grading to gray, 2 feet of shale, with few thin seams of fine gray sand.

(Testimony of G. F. Follansbee, Jr.)

Q. You have been reading from the core log, have you, Mr. Follansbee? A. Yes, sir.

Q. Will you show me thereon that part on your log which is between 5730 and 5750 where you stated on direct examination that there was apparently oil sands between those distances that looked fairly good, 5730 to 5750?

A. For 5723 to 5733 we recovered 5 feet of oil sand. Let me read this.

Q. Yes. A. Firm to hard fine medium light brown, few streaks of brown and gray shale, and 6 inches sandstone shale from bottom. Sand has fair saturation, good odor and brown cut—

The Referee: What was the last word you used?

The Witness: Cut. We use carbon tetrachloride to extract the oil from the sand. Depending on the color of the sand that shows in that carbon tetrachloride is the manner it is graded.

5733 to 5743, recovered 7 feet of oil sand, firm, massive fine to medium, good odor and brown cut.

5473 to 5753, recovered 10 feet. 1 foot of oil sand [169] as above and 9 feet of shale with streaks of oil sand totally 1 foot 6 inches, few thin streaks of gray silt.

Mr. Cahill: Q. You are below 5750 now?

A. Yes, it is at 53.

Q. Now, having that log before you and being of the opinion that there might be a possibility in the area that you last testified concerning, you obtained this electric log to either confirm or dispel your original judgment, will you state to the Court what you found in the electric

(Testimony of G. F. Follansbee, Jr.)

log after you received it, in the area 5730 to -50 that gave you a different viewpoint?

A. The deep penetration curve in that 20 or 15 feet of sand was just fair. In a good oil sand usually the third curve will more closely follow the normal curve. The fact that that low third curve and the coring of the gray sands immediately above, I was of the opinion that that 20 or 15 feet would not be commercial.

Q. Did you then stop at that point or did you take any steps to either confirm your judgment or disprove it? In other words, you run a production test?

A. No tests were run. We then plugged the hole.

Q. Did you feel at that time that you had drilled to the bottom of the Ford horizon? A. Yes.

Q. The 237 Zone had not been discovered in the general area at that time, is that right? [170]

A. No, it had not.

Q. So not having knowledge of that possibility you did not seek that or drill down to where it might have been? A. No.

Q. Do you recall, Mr. Follansbee, approximately when the 237 Zone was discovered in the same area?

A. Well, the 237 Zone has never been found productive in this area.

Q. Wasn't it produced across the channel over by the Bankline Oil Company?

A. It was produced over across the channel at a much higher structural position.

Q. And produced profitably? A. Yes.

Q. It may have been the Universal Consolidated Oil Company, but some one connected with your company

(Testimony of G. F. Follansbee, Jr.)

had a well over there that was quite productive in the 237 Zone, did they not?

A. One of the men that was connected with another deal over there.

Q. Some company that Mr. Williams had something to do with, Tommy Williams?

A. Just an employee.

Q. Not an owner? A. No. [171]

Q. Will you state to the Court, please, what would have been necessary to run a production test on this Well No. 6?

A. I believe it would have been necessary to have set a string of pipe.

Q. That is casing?

A. Casing and cemented it and tested it.

Q. That would have been from 4100 to 5750, is that right?

A. No. It would have been—I don't have the full well record here, but it would have been from somewhere in the neighborhood of 2750 or 2800 down to this 5700.

Q. In other words, the whole well had been cased to a depth of about 2750, I mean the original well, not the old well?

A. The original well had $11\frac{3}{4}$ inch cemented at around that depth. Below that we had several cement jobs which were true perforations, but in order to exclude the water it would have been necessary to have brought the casings back to that original Ranger shutoff point.

Q. At any rate there was no production test attempted of any kind either with or without casing? A. No.

Mr. Cahill: If your Honor will permit for a moment I would like to confer with Mr. Carrey, for one reason:

(Testimony of G. F. Follansbee, Jr.)

I find frequently if you leave a witness like this go the [172] other expert will say, "You should have asked this question." Besides, I am not a geologist.

The Referee: All right, sir.

Mr. Cahill: No further questions, Your Honor.

The Referee: How deep is the 237 Zone?

The Witness: It should come in here, I should think, within the next two or three hundred feet, say at 6100 or 6200, in this location (indicating).

The Referee: Any questions?

Redirect Examination

By Mr. Lynch:

Q. Where is the closest well to 237?

A. I believe the closest one would be across the channel.

Q. That is approximately how far away from this well?

A. There is no scale on this map, but I would say off-hand it would be somewhere in the neighborhood of a thousand feet. It is pretty hard to guess.

Q. Have you formed any opinion, Mr. Follansbee, as a result of your knowledge of this area and particularly of this property as to whether or not the 237 Zone underlies this property?

A. In my opinion it does not.

Q. Was there anything about the nature of the hole [173] at No. 6 which would have prevented your putting down casings for the purpose of running a production test? A. No.

(Testimony of G. F. Follansbee, Jr.)

Q. If you thought anything would be discovered as a result of making a production test you could have put a casing down there?

A. Yes, there could have been a casing run.

Q. Which side of the fault was the No. 6 hole bored on, that is, as deepened?

A. Well, are you speaking of the redrill?

Q. Of the redrill.

A. It was on the west side.

Q. It is a fact, Mr. Follansbee, that practically no production was discovered on the east side?

A. There has been no production below the Ranger.

Q. On the east side of the fault?

A. On the east side.

Q. This property across the channel, would that be higher on the structure than the property here?

A. It is considerably higher on the structure.

Q. That would be on which side of the fault?

A. It is on the west side of the fault.

Recross Examination

By Mr. Cahill:

Q. I show you a map which has been marked Trustee's [174] Exhibit 6 which shows the Newport property and also shows adjoining lands marked on this map "Southern Pacific Railroad."

Are there oil wells on the portion marked Southern Pacific Railroad? A. Yes.

Q. Are there any wells thereon producing from the 237 horizon? A. Yes, there are.

Q. Are you able to tell us approximately or exactly how far those wells are from the Newport property?

(Testimony of G. F. Follansbee, Jr.)

Mr. Lynch: From the 6 acre parcel, counsel?

Mr. Cahill: Q. Yes, from the 6 acre parcel.

A. I would say in the neighborhood of a thousand—
pardon me. In what zone?

Q. 237. A. Approximately a thousand feet.

Q. So it is a thousand feet either way across the
channel?

A. It possibly is closer across the channel than this
way. I am not sure.

Mr. Cahill: Thank you very much. I have no further
questions.

Mr. Lynch: I have no further questions, Your Honor.

The Referee: All right, Mr. Follansbee; thank you.

Mr. Lynch: May Mr. Follansbee be excused? [175]

The Referee: Yes, sir, you may go right on back.

Mr. Cahill: Do you have anything else?

Mr. Lynch: No, I have nothing else.

The Referee: Any other testimony?

Mr. Cahill. I have a witness here from Long Beach.
I would like to take him a little out of order. The logical
thing to do would be to follow with Mr. Carrey and Mr.
Meade. This expert is going to testify on one limited
matter and I think we can get rid of him very soon.

The Referee: Let's hear him.

Mr. Cahill: Mr. Burgess, will you come forward,
please?

CLARK C. BURGESS,

called as a witness on behalf of the Objector, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cahill:

Q. Mr. Burgess, will you state your full name, please?

A. Clark C. Burgess.

Q. Where do you live, Mr. Burgess?

A. Long Beach.

Q. What is your business or occupation?

A. Partner of the Swanson & Burgess Company, real [176] estate brokers.

Q. You are a realtor? A. Yes, sir.

Q. How long have you been so engaged?

A. Since about 1934.

Q. At Long Beach?

A. That is right.

Q. Have you had occasion to become familiar with what is referred to generally as waterfront property in that area? A. I have.

Q. Have you had occasion recently to study the values of waterfront property on the Long Beach Harbor area?

A. I have.

Q. Have you had occasion recently to make appraisals or sales of such property?

A. No, not sales but leases.

Q. Of waterfront property?

A. That is true.

Q. For whom?

A. Long Beach Dock & Terminal Company.

Q. Are you familiar with the F. P. Newport property, particularly the 6 acre parcel in Channel No. 3?

A. I am.

(Testimony of Clark C. Burgess)

Q. Do you have knowledge of the adjacent channel [177] property, in Channel No. 2?

A. I have.

Q. Do you know of any recent transactions in reference to the lands on that channel, Channel No. 2?

A. I do.

Q. Will you state what knowledge you have?

A. As a broker I did negotiate and consummate a lease between the Long Beach Dock & Terminal Company as lessor and the Golden State Pipe Corporation as lessee. That lease was for 15 years commencing June 1, 1947, and terminating May 31, 1962. The property involved was a ground lease, surface rights only on a parcel of land having water frontage of approximately 300 feet, on the south side of Channel 2, to a depth of 521.9 to Seventh Street. The total area involved was approximately 156,570 square feet. Excluded for two wells and two tanks were 18,200. The net square footage charged to Golden State's lease was 138,370 square feet. The rental was based on 5 per cent of the fair market value of the property exclusive of improvements to be placed on the property by the lessee, and said value stated in the lease was \$212,400. That was for the first five years only.

At the beginning of each five-year period to follow the rent would be 5 per cent of the appraised fair market value, but in no event less than the first five year rent which was \$885 a month or \$10,620 annually—taxes to be [178] paid by the lessee.

Q. Have you made a mathematical calculation based on the 212,400 determination in the lease?

(Testimony of Clark C. Burgess)

A. Approximately a little better than a dollar and a half. I would say \$1.53 a square foot; in the neighborhood of \$66,600 and some odd per acre.

Q. You are actively engaged in the area now in selling real estate? A. I am.

Q. Do you believe that the parcel known as the 6 acre Newport parcel is now salable? A. Yes.

Q. Do you believe that it can be sold under the present condition with wells located thereon, producing oil?

A. I do.

Q. Do you have an opinion as to what it could be sold for at the present market?

A. Well, based on this lease just consummated and another lease that we are about to consummate and by conversations with the owners of channel property, I think it could be sold in the neighborhood of from sixty to sixty-five thousand dollars an acre.

Q. In your opinion how long would it take to find a purchaser at such a price?

A. That is rather difficult to say, but I would say [179] approximately 90 days.

Q. Isn't it customary, Mr. Burgess, on the sale of property that does not readily sell, like tracts of grounds and industrial tracts, that they require a longer period to find purchasers than it does for houses, apartment houses, or flats or something of that kind?

A. That is true.

Mr. Cahill: You may cross examine.

(Testimony of Clark C. Burgess)

Cross Examination

By Mr. Lynch:

Q. Mr. Burgess, were you aware that this property had been offered for sale before? A. No.

Q. You weren't? Where is your office?

A. 150 American Avenue.

Q. That is in Long Beach?

A. That is right.

Q. Mr. Burgess, has there been any property sold within the last five years on Channel No. 2, on Channel No. 3, or any other waterfront property at \$60,000 per acre? A. Not to my knowledge.

Q. Do you know of any sales of waterfront property in that area or in the Long Beach-Wilmington area for any sum in excess of \$40,000 an acre? [180]

A. Not to my personal knowledge, no, sir.

Q. So your testimony as to the value of the property is based purely upon your speculation or opinion as to what the property would be worth by using a mathematical calculation, and using as your premise the figure that was arrived at artificially concerning this lease, isn't that true?

A. What do you mean artificially?

Q. As I understand your testimony the rental on this piece that was leased was determined by taking 5 per cent of what you consider to be the valuation of that property?

A. That is right.

Q. Now, in arriving at the valuation which was some \$200,000 you had no sales in the area to support that valuation? A. No—that is right.

Q. So you merely arrived at that by determining what you thought was the value of the property?

A. And the lessee and the lessor.

(Testimony of Clark C. Burgess)

Q. In other words, negotiations between the two parties trying to arrive at a figure at which this property could be leased they took this formula of arriving at it?

A. Yes.

Mr. Lynch: That is all.

The Referee: Has anybody representing the bankrupt [181] corporation approached you or your firm in the last three, six, or eight months in an effort to get you to sell this 6 acre property.

The Witness: No.

The Referee: When were you first contacted down there with reference to this matter?

The Witness: Saturday morning.

The Referee: Last Saturday?

The Witness: Yes.

The Referee: That is all.

Mr. Iverson: Just a moment. I would like to ask some questions.

The Referee: Very well.

Cross Examination

By Mr. Iverson:

Q. Mr. Burgess, are you familiar with sales of property in this area? A. On Channel No. 2.

Q. On Channel No. 2. What about Channel No. 3?

A. Well, I know of no recent sales on Channel 3 or Channel 2.

Q. Do you know about a sale by the State Building and Loan Commissioner to the California Sea Food Company on December 9, 1941? A. Yes. [182]

Q. How much was that sold for?

A. I don't recall what that sale price was.

(Testimony of Clark C. Burgess)

Q. Do you know how large that parcel was?

A. Yes, approximately 8 acres, I believe, of which there was only about 100 foot of waterfrontage.

Q. You don't remember the price on that?

A. No.

Q. Are you familiar with the sale of Patten Blinn Lumber Company?

A. No, I am not.

Q. Do you know anything about a sale of the Southern Pacific to Procter & Gamble?

A. No.

Q. What sales do you know about in that area?

A. Recent. I may put it this way, that in my opinion that property has jumped up considerably since the end of the war and that is the time so to speak that I moved into Channel 2 and Channel 3 area for leasing.

Q. But you have not sold any property at all in that area?

A. No; just my leases and some exchanges.

Q. Are you familiar with the sale of Brooks to the City of Long Beach on December 31, 1941?

A. No, sir.

Q. Are you familiar with the Spreckels deal?

A. Not in detail. [183]

Q. On March 11, 1946?

A. No.

Q. Do you know what that sale was?

A. \$960,000, I understand.

Q. What was that per acre?

A. I don't know what acreage was involved.

Mr. Iverson: That is all.

(Testimony of Clark C. Burgess)

Redirect Examination

By Mr. Cahill:

Q. Mr. Burgess, your familiarity with these properties starts with the end of the war, you say?

A. Yes.

Q. Were you familiar generally with the values, very generally, as of the end of the war?

A. Well, in what respect, the rental value?

Q. No. The sale value of the property or possible sale value? As a matter of fact, there were no sales during the war, is that correct?

A. Not to my knowledge.

Q. But you do believe that since the war there has been a marked increase in price? A. Definitely.

Q. Why? What has brought that up?

A. Well, I would say that this, the Southern California and the channel area was somewhat discovered [184] during the war as a place for light manufacture and warehousing and the type of business that must go in a harbor area.

Q. You think the war brought about a recognition of those factors and it is desirable for those reasons?

A. That is correct in my opinion.

Mr. Cahill: That is all.

Recross Examination

By Mr. Lynch:

Q. Yet you know of no sales since the war at anywhere near these prices that you have referred to?

A. That is right.

Q. I show you a photograph—

The Referee: Is it marked?

(Testimony of Clark C. Burgess)

Mr. Lynch: No.

Mr. Iverson: That is No. 6, I believe, from Tom Cunningham?

Mr. Lynch: No, this is the aerial photograph.

Mr. Iverson: That is No. 8.

Mr. Cahill: There it is, Trustee's Exhibit No. 8.

Mr. Lynch: Q. I show you Trustee's Exhibit No. 8 which is an aerial photograph of the area. Can you point out on that photograph the property that was leased and concerning which you testified?

A. Yes. It was east. I take it this is the Procter [185] & Gamble plant?

Q. Yes, that is the Procter & Gamble plant.

A. It was approximately in there (indicating).

Q. Just east of the Procter & Gamble plant?

A. Not just east. I think the first property is the Breslin property.

Q. It adjoins the Breslin property?

A. That is right.

Q. Along the front of that property there was a sea wall?

A. There was a dock in need of some repair. I think there was considerable piling that had to be replaced in this dock.

Q. But there was a wall of some kind, either by piling or concrete? A. That is right.

Q. You notice the property is eroded heavily. There is no wall there.

A. Yes, I noticed that.

Mr. Lynch: That is all.

(Testimony of Clark C. Burgess)

Redirect Examination

By Mr. Cahill:

Q. What is the distance approximately between the Newport 6 acres and this portion on Channel No. 2 as to which you have made the lease? [186]

A. Well, the Newport property goes to the south line of Seventh Street. The Long Beach Dock & Terminal Company goes up to the north line of Seventh Street.

Q. The two parcels on different channels practically touch?

A. They are separated by the width of Seventh Street.

Q. In your opinion, Mr. Burgess, are the two properties, one comparable with the other?

A. I think so.

Mr. Cahill: That is all, your Honor.

The Referee: All right, sir, you may stand aside.

Call your next witness.

Mr. Cahill: I will call Mr. Carrey.

Mr. Lynch: I think we can all stipulate to Mr. Carrey's qualifications and the Court is aware of them.

The Referee: Yes. I have been signing his checks for two or three years.

Mr. Lynch: I don't think Your Honor needs to waste any time on it.

The Referee: We will assume he knows his business until some one tells us to the contrary.

Mr. Cahill: I will ask one or two questions so that there will be some record that he is qualified. [187]

ALBERT A. CARREY,

called as a witness on behalf of the Objector, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cahill:

Q. Mr. Carrey, what is your full name? A. A. Carrey? A. Albert A. Carrey.

Q. Where do you reside?

A. Long Beach, California.

Q. What is your business or occupation?

A. I am consulting geologist, petroleum engineer, and also operate an oil company.

Q. How long have you been so engaged?

A. Since 1937.

Q. You are a graduate of what school?

A. Stanford University.

Q. What matters?

A. In the Department of Geology, 1922.

Q. Are you also a petroleum engineer?

A. Yes, sir.

Q. Were you at one time or another employed as geologist or chief geologist for various oil companies?

A. I worked for various companies, most of the time for a company that is now the Texas Company. I was in [188] charge of their geologic department for two years. That is the biggest company I have worked for.

Q. You have also had a varied experience in drilling and producing wells?

A. Yes. I have operated two or three companies, drilled several wells, several wild cat wells and quite a few wells on Signal Hill.

(Testimony of Albert A. Carrey)

Q. You have been employed by Mr. Metcalf in this matter for a good many years, have you?

A. Yes, sir.

Q. As petroleum engineer? A. Yes.

Q. You have also rendered a report which is on file in this case as of October 1, 1939?

A. That is correct.

Q. Entitled "Valuation Report of the F. P. Newport Company Royalty Interest, Wilmington Oil Field"?

A. Yes, sir.

Q. You also have testified in this matter, the F. P. Newport matter many times, have you not, in reference to the oil and oil matters in this estate?

A. Yes, I have. Several times.

Q. Are you familiar with the lands that comprise the Long Beach-Wilmington Oil Field? A. Yes, sir.

Q. Are you familiar with the block, I think they [189] call it, that contains the Newport properties?

A. Do you mean the geologic block?

Q. Yes. The geologic block. A. Yes, sir.

Q. That is Block No. 5?

A. Some designate it as No. 5, yes.

Q. Approximately how many wells are located in that block?

A. I have never had occasion to add the number of wells in that particular block.

Q. There are a very large number of wells?

A. Yes. I would guess probably more than 100 wells in that block or 150, perhaps.

(Testimony of Albert A. Carrey)

Q. They are on the lands of not only the Newport estate and Southern Pacific and other companies?

A. It extends in a north-south direction. It takes in two channels and then the Hancock Oil Company, and then various smaller owners in the Town lot area and runs out into the ocean.

Q. The drilling of approximately 100 wells in that block was into what horizons or known zones?

A. There are wells producing in that block. I think originally the Lower Terminal Zone and the Upper Terminal Zone and then Ranger, and then successively they call it Tar Zone which is an upper zone, and then successively the Ford Zone, and then the 237 Zone, I think, in that [190] sequence.

Q. Was there an agreement for a time to produce only from those zones and horizons other than the Ford and 237 Zones?

A. Yes. For several years the wells were curtailed and there was some sort of a mutual agreement between the companies that they would refrain from going into any deeper zones.

Q. In this particular block that we have under discussion, what year was a test made of the Ford Zone of which you have any knowledge.

A. That I couldn't say without going through the records. The Ford Zone was divided over there north-west, in the Wilmington area, and it proceeded and cut toward the Long Beach city line. This agreement was only in the boundaries of the City of Long Beach. It didn't go into the Wilmington Field. There were a lot of wells producing from the Ford Zone in the Wilmington area before they came into the Long Beach area. Just when

(Testimony of Albert A. Carrey)

that was or which wells I wouldn't know, but I believe it was on the Union Pacific property over near the Ford plant. I think that is where the first Ford Zones were drilled in the City of Long Beach area.

Q. Those wells were quite productive, were they not?

A. A good many of them have varied considerably in [191] Ford Zone. There isn't a consistent production.

Q. Was there a situation of quite a good well or a fairly good well and one that was right close to it not nearly so good? Do you have that situation?

A. Not that so much as in different areas. The wells were more or less the same production in the local area, but for a few hundred feet or a thousand feet they would operate. There was a difference of thickness of sands in the Ford area. In some places they seemed to be of greater thickness than in other areas of the structure.

Q. Do you recall approximately the year there was a well drilled into the Ford Zone close to the Newport property?

A. Well, there again, without going to the records, I wouldn't know which well. There were two wells, I believe now on the General Petroleum—S. P. property. I would say those were drilled about—well, the first one probably not over $2\frac{1}{2}$ years ago. That was roughly about the time.

Q. We had testimony this morning from Mr. Follansbee that the Universal Consolidated Oil Company deepened Well No. 6 on the Newport property in 1944. He didn't give us the month and I didn't ask him, but he said the year 1944.

A. As I recall this well drilled by Universal was one of the first wells drilled in that area deeper than the

(Testimony of Albert A. Carrey)

Terminal Zone. I think that was done prior to the time that almost anybody was making it at the time of the agreement. [192] There was more or less a mutual agreement when this well was drilled.

Q. In your work for the Trustee herein haven't you had as part of your duties to keep in touch with what other producers are doing concerning this lease?

A. Well, I receive a daily report and I do keep up to some extent on not all of the property, but I do try to keep up with the wells placed on production. I don't have all of the production data on the wells.

Q. So far in this proceeding, as I recall, Mr. Carrey, you have been asked on one or more occasions to give your opinion as to whether the Ford Zone did underly the Newport property. You have heretofore rendered an opinion several years ago, I believe, in this matter.

A. That is true. I rendered one in that report and I think I rendered an opinion once or twice since then in different matters.

Q. Do you have any present opinion as to the Ford Zone, whether it underlies the Newport property or not?

A. Are you referring now to just the 6 acres?

Q. The 6 acre parcel, yes.

A. Well, my opinion is that the evidence in the electric log that was taken on the well, and the core record, that there was evidence of accumulation of oil. The amounts possible to production is still high so it is a moot question. The fact the sands are there and there was [193] saturation is evidence there might be some kind of production. But I don't think anyone knows today because the company who drilled the well did not make a test on it, they did not think in their opinion that it was

(Testimony of Albert A. Carrey)

perhaps worthy of a test, but there were oil sands cored, and the electric log verifies the fact there was some saturation.

Q. When you say test you are referring to a production test?

A. Yes, where they would have to set a string of casing and determine the productivity of the sands.

Q. That is the common and accepted procedure, to make a production test?

A. That is the only way you can do it except sometimes you can take a formation test, but the real test is the setting of casings and making proper tests to decide whether or not to produce commercially.

Q. Isn't it true that even where production tests are taken and are fully and completely made as to a particular well, that upon the end thereof, and having the data from that test before you, that experts conclude as they must, that the test as to the land involved is not conclusive?

A. I don't know as I understand your question. Would you read it to me?

Q. I will reframe it. I am asking if it is not frequently known that a production test actually made of a [194] certain well on certain lands, upon its conclusion, after the results of the test being available, that the test is not conclusive as to whether oil in those particular horizons underly those particular lands in productivity quantity?

A. Well, I would say yes. That has happened. I have seen it happen where a test may not be conclusive. Perhaps in an instance where the company may not have tested sufficiently long. There may have been infiltration

(Testimony of Albert A. Carrey)

of mud which penetrated back into the sands, and by virtue of not being sufficiently strenuous and doing certain things sometimes down on production tests—the mud may have been completely removed and thereby not give the sand a chance. I have seen that happen.

Q. That is where a casing is run and a production test is made? A. Yes.

Q. It is still not conclusive in certain instances?

A. Sometimes it is not conclusive, that is right.

Q. Let me ask your opinion on this question, Mr. Carrey. Assuming that the Universal Consolidated Oil Company had run a casing to a sufficient depth in this well, after the redrilling and had run a production test, do you believe that any production test as to the 6 acres, limited to Well No. 6 alone, could ever be conclusive as to the whole 6 acres? [195]

A. Well, I would say if the well was completed mechanically O. K., that is, no difficulties in drilling, and they punctured the zones, that the location of the bottom of the hole in No. 6 is at its most favorable position on the 6 acres; that is, from a structural standpoint the bottom of that well is at the most favorable position.

Q. Do you recall the early history of that well in reference to what is commonly referred to as grief in reference to the well?

A. I don't recall any particular grief. It was a directionally drilled hole and all directionally drilled holes are not as easy to drill as straight ones. They had undoubtedly a lot of difficulty. I don't think any directional holes are without trouble. They are hard to drill and that particular job was a little tough because they had to hit

(Testimony of Albert A. Carrey)

a target, in other words, so that they did have some directional difficulties as I recall.

Q. Mr. Follansbee testified in his opinion that it bottomed approximately 300 feet from true vertical.

A. Without measuring it on the map I think that is around about the distance, yes. That is bottomed pretty close to the southwest corner of the lease.

Q. Wasn't it true on the Terminal Zone that well went off production and was constantly being worked on?

A. As I recall the well has had trouble. I think it was mostly sand trouble from the Ranger Zone which was [196] the only producing zone at that time east of that fault, and at a lower portion of the Terminal I would say.

Q. You heard the testimony of Mr. Follansbee this morning, that having drilled the well and examined the core log and other data he said there was sand between 5730 and -50, and as I got his words, it was a fair looking sand and possibly worthy of a production test, and that the company proceeded to obtain an electric log and after having received the log, that the original favorable opinion was changed somewhat. Do you recall hearing that testimony?

Mr. Lynch: I object to the question on the ground it assumes facts not in evidence. Mr. Follansbee did not testify that in his opinion it was worthy of a production test.

The Referee: I don't recall exactly what he said, gentlemen. You will have to have his testimony read back if there is any controversy.

Mr. Cahill: The only thing I am attempting, I wanted to get it as accurate as possible.

(Discussion omitted.)

(Testimony of Albert A. Carrey)

The Referee: All right. What is the next question?

Mr. Cahill: Assuming the Universal Consolidated Oil Company having before it the core log showing the possibility of productive sand between 5730 and 5750 feet, and then receiving an electric log and examining that log, [197] and concluded that it was doubtful that those sands would be productive—I am going to ask you to examine that log at that point and state whether in your opinion in any portion thereon which would indicate that it would not have been wise to run a production test?

A. Well, my opinion is, and I felt at the time, and still feel, that there is there, was and still is some possibility of production. As I say, this is my opinion. If I had been on that well I believe, I am sure that I would have recommended that a solid string of pipe be run. I mean by that, casing, and do certain under-framing between these points which showed some indication of oil or which place is between 5730 and -45.

Q. Are there also other points in your opinion indicated which should have been tested?

A. There are some points. The sands are not very thick, but I would have advised to run a solid string with proper type of cement job so that you could shoot the places for production. Not only one place—you could try it first and then successively come on up and test these so that if the job was performed properly the various three or four or five places that indicate possibilities, some place may be only a foot, but the accumulation of all of them I think in my judgment would have possibly made some kind of an oil well. Then it is an opinion of how much oil and I am in no position to say how much. [198]

(Testimony of Albert A. Carrey)

Q. You are of the opinion that commercial production might have been possible?

A. I know I would have been in favor of making that type of test if I had been in a position to make the recommendation. In my experience so many times I have seen where sometimes these electric logs do not show too good. Sometimes even the cores do not look too good. But the final answer is the test and the rest is opinion and judgment, based on how much experience a man has had. I am a great believer of testing any sand with oil in it. I have seen them come back too many times later and produce oil from zones that some of us thought at one time were not productive.

Q. In your opinion the only method that can at all approach the conclusive is the production test?

A. That is the only way that is final and conclusive, to prove the capabilities or productive qualities of any sand.

Q. You are examining an electric log which is in evidence in this case as Objectors' Exhibit 00. I state to you that that is the number of the exhibit. You are examining that log now, are you? A. Yes, sir.

Q. Are these markings in pencil your markings or Mr. Meade's markings?

A. I think this is my log. [199]

Q. Yes, I know it is your log.

A. I see my name on it. I took the core record and those markings I put in color to save going back over the core record. I often do that. Red represents water and the black was possible sands that had oil of some degree in them. That is so I don't have to go back over and read the written record each time.

(Testimony of Albert A. Carrey)

Q. With reference to the 237 Zone do you have any knowledge of that as to this particular area and these particular lots?

A. That particular zone has not been tested in this 6 acres. The closest, I believe, is on the General Petroleum-S. P. property.

Q. How far away is that, that is, the well that has the test on it?

A. I would have to measure it on the map but I would say it is probably seven or eight hundred feet or maybe a thousand feet, without measuring it.

Q. Is it productive there?

A. Later they found some zone—

Q. Do you have an opinion whether that zone might underlie the 6 acre parcel?

A. I think the sands are there and I personally believe that there might be a chance. There is a fair chance of production. The location, however, on the 6 acre parcel is not as good structurally as the S. P. [200] property. It is lower and it is closer to the fault that intersects that property. I base my opinion that the 237 Zone is possibly saturated to some degree to the fact that the Ford Zone had some saturation. It is reasonable to believe if the Ford sands had some oil in them that the sands that abut the schist there in the 237 will also, and they might have more saturation because the 237 Zone is a great deal more productive zone than the Ford Zone.

Q. In other portions of the field?

A. In other portions of the field the 237 Zone is a little better because the sands are thicker. There was more thickness of sands in the 237 Zone than the Ford Zone.

(Testimony of Albert A. Carrey)

Q. The 237 Zone has never been tested on the Newport property, has it?

A. No. It didn't go quite deep enough in this well.

Q. You maintain wells drilled into that property on the 6 acres might have valuable production?

A. You can't say it wouldn't because it is within the boundaries of production in the Lower Terminal with the Ranger on the other side of the field. There is some saturation in that Ford Zone. I don't think anyone can say no, that it is impossible.

Mr. Cahill: No further questions of this witness. [201]

Cross-Examination

By Mr. Lynch:

Q. You are familiar with the provisions of the lease to which counsel referred this morning, particularly that portion of it which reads as follows:

"For a failure of the Lessee, when reasonably necessary and proper so to do, to develop any known commercially profitable zone or stratum the Lessors may forfeit the right of the Lessee to develop or produce any such zone or stratum or any zone or stratum below any depth from which the Lessee may then be producing on said premises, or the Lessors may pursue any other remedy given them by law hereunder."

You are familiar with that provision in the lease?

A. Yes. I read that some time ago.

Q. A matter of fact we discussed it in our office approximately two weeks ago, didn't we?

A. Yes, I think so.

Q. Subsequently to the time we ascertained the results on this particular 6 acres?

A. Yes.

(Testimony of Albert A. Carrey)

Q. Are you prepared to say at this time that the Trustee should forfeit the lease as to this particular zone?

A. Which zone do you mean?

Q. The Ford Zone. [202] A. The Ford Zone?

Q. On the basis of the facts as you now know them?

A. You mean on the basis of this particular paragraph that you just read?

Q. Yes, and on the basis of the evidence, what was done in relation to No. 6 and the production there?

A. I don't think that test was made. There was no test made. They merely drilled into the sand and it was a matter of judgment and opinion.

Q. That is right. But on the basis of the evidence and the facts now known to you would you be prepared to recommend to this estate that the rights of the Universal Consolidated Oil Company in their lease to develop that zone be forfeited?

A. I don't believe I would go that far. I don't believe there has been production close enough to the property, and the fact, as I stated a little while ago, that this particular 6 acres is in as well located as closest 237 or Ford Zone there, but I don't believe that the zones have been thoroughly nor properly explored. I really believe that.

Q. If we succeeded in cancelling or forfeiting the rights of the lessee to develop that zone, if there is such a zone underlying the property, in light of the evidence and the information before you, do you believe that the Trustee [203] could obtain any company or any lessee who would go in there and drill a well to the Ford Zone?

A. Well, I think not, for two reasons. One is, under the State law as it is, you couldn't drill a new well without the abandonment of one of the other wells.

(Testimony of Albert A. Carrey)

Q. That is right.

A. Or you would have to get your permission from the Universal Consolidated Oil Company to purchase or deepen it. No other wells could be drilled at the present time.

Q. Assuming a well could be drilled with arrangements with Universal Consolidated Oil Company, do you think it would be possible in view of the others and what was discovered in the drilling of No. 6 to a deeper zone to find a lessee who would at its own expense drill a well to that zone on Parcel No. 2, or the 6 acre parcel?

A. Oh, I think there is sufficient evidence which probably enters further into it, but whether someone would do it I am not in a position to say whether they would. I think there is sufficient evidence to warrant a test, but whether someone would want to drill a new hole, I don't know.

Q. Do you remember our discussing this matter approximately two years ago after we got the report on what had been done in relation to No. 6 and we particularly inquired from you at that time if you thought the evidence [204] would justify our attempting to forfeit this, and your answer was substantially the same as you now give, that you didn't think it was?

A. I had forgotten that answer.

Q. You remember also you said at that time you didn't believe it would be possible to find anyone who would undertake to drill that property to that zone on the 6 acre parcel?

A. Yes, and the answer at that time was probably based on just the Ford Zone, but since then—

Q. The Ford Zone only?

A. That is right.

(Testimony of Albert A. Carrey)

Q. We were not discussing the 237 at that time?

A. My answer should be different now. If that was my answer then it should be different now because another zone has been developed, a better one which gives you two possibilities instead of one.

Q. But do you believe you would now in view of evidence that a lessee could be found who would drill a well on the 6 acre parcel through to the Ford or to the 237 at his own expense—I realize somebody could be hired at the Trustee's expense if we had the money to do it.

A. Well, at this particular time oil is in such great demand and I know a lot of places they are drilling with not as much possibilities as that. I would say yes, I believe that someone could be induced with the evidence [205] perhaps to drill a well to both zones, the Ford and the 237.

Q. On this 6 acre parcel? A. That is right.

Mr. Lynch: That is all.

The Referee: All right, sir.

Mr. Iverson: I have a few questions.

Cross-Examination

By Mr. Iverson:

Q. Because of the location of the fault there, Mr. Carrey, isn't it true there is only a small portion of the 6 acres that can be used to drill in order to bottom it in the 237 or Ford Zone?

A. That we don't know. We know the fault is intersected by No. 6 on the west side of the property at a high enough depth to assure that both zones are there. That field has a vertical angle to the east. If you intersect it

(Testimony of Albert A. Carrey)

you go underneath it. I am not in a position to say just how much of that 6 acres, whether it would be all good or maybe 50 per cent of it or less, but I would say that a good portion of it is at least possible for production due to the fact that the evidence we have in the No. 6 deepening. But how much of the 6 acres I wouldn't care to say. I don't think anybody knows that.

Mr. Iverson: That is all.

Mr. Cahill: Just one question, Mr. Carrey. [206]

Redirect Examination

By Mr. Cahill:

Q. During your absence the matters contained in your letter to me of October 17, 1947, were by stipulation read to the Court and by stipulation was received in evidence. I direct your attention now to one portion of that letter and I propose to ask you one question in reference thereto. I will read to you from the second page of your letter as follows:

"It is my opinion that if this sale is made that the present landowner, the F. P. Newport Corporation, will suffer a decided loss in the sale value of their land-owner's interest. It has been my experience there are few buyers for overriding royalties as most royalty buyers prefer mineral interests."

I will ask you if you have an opinion in reference to the decided loss that you speak of there, as to what that loss would be in percentage.

Mr. Lynch: I object to that on the grounds it is wholly irrelevant and immaterial in this matter. We are not attempting to sell the landowner's royalty interest.

(Testimony of Albert A. Carrey)

The Referee: It is highly conjectural and speculative. It depends on what type of buyer you can find and what kind of seller you have. The objection is sustained.

Mr. Cahill: I will state to Your Honor that under an [207] offer of proof I would like to prove from this witness, noting that we already have testimony of the expert Meade, that in his opinion the loss to this estate by the very fact of this sale would be 25 per cent; that this witness if allowed to answer the question which I propose to ask him as to what in his opinion the loss would be will state that the loss in his opinion would be much higher than 25 per cent.

Mr. Lynch: I object on the ground it is wholly immaterial in this matter, there not pending at this time any sale of the landowner's royalty interest.

The Referee: That is true. The only thing to be sold now are the surface rights.

Mr. Lynch: That is right.

The Referee: Objection sustained and the offer of proof is denied. I want to get to the end of this by 4:00 o'clock this afternoon.

Mr. Cahill: I have no further questions of this witness.

The Referee: I will tell you frankly I want to conclude this matter by 4:00 o'clock. I have heard about all I think I want to hear on it. I am mainly interested in the value of it. These values run from \$390,000 down to Mr. Mason's figure of \$196,500.

I will see you at 2:00 o'clock.

(Whereupon, the hearing was adjourned until 2:00 o'clock p. m., this day.) [208]

Los Angeles, California, December 1, 1947.

2:00 P. M.

ROY G. MEAD,

having been previously duly sworn, was examined further and testified as follows:

Direct Examination

By Mr. Cahill:

Q. You have been heretofore sworn and testified in this matter? A. Yes, sir.

Q. Have you had an opportunity during the course of this day to listen to the testimony given by Mr. Follansbee?

A. Yes, I was present in court when Mr. Follansbee testified.

Q. During all of his giving of his testimony on direct examination, cross-examination and redirect examination?

A. Yes, I heard all of his testimony.

Q. Is that the same as to the testimony given by Mr. Carrey? A. That is true, yes.

Q. After having heard the testimony of those two experts, do you remain of the opinion that as to this 6 acres, that the Ford Zone lies thereunder? [209]

A. Yes, I am still of that opinion.

Q. And that there might be a possibility of profitable production from that zone?

A. Yes, that is my opinion. I wouldn't know how much production, but there is a possibility of some production in my opinion.

(Testimony of Roy G. Mead)

Q. Do you also have an opinion at this time after having heard their testimony in reference to the possibility of production from the 237 Zone?

A. I am of the opinion that the 237 Zone lies under this property as well as the Ford Zone.

Q. Do you think that the production might be profitable from that?

A. It might be more profitable in the 237 Zone than the Ford Zone.

Q. Do you think that both those zones should be drilled in and tested by production tests?

A. By all means I do.

Q. The question was asked of the witness Carrey on cross-examination whether in his opinion it would be profitable for the Trustee herein to obtain people who would go in and be willing to drill those zones and run a production test at their expense provided that we had obtained the right to do so.

A. I do, providing there would be no legal objection to the drilling of a well. Of course, under the State law, [210] there can only be one well to an acre and that objection would have to be removed.

Q. I will have to limit my question to this proposition that if in some manner it would be possible legally to either drill a new well or to drill a deeper one in one of the existing wells, do you believe that oil people or financiers could be found that would come forward who would be willing to make a contract with the Trustee?

A. I do, what with the scarcity of oil right now, and the attitude that the people in the oil business are taking towards drilling oil zones on properties that heretofore weren't considered profitable.

(Testimony of Roy G. Mead)

Q. Do you, yourself, have knowledge of some such people?

A. Well, I know people that probably could be interested in such a proposition. I am not a broker; I couldn't interest them. I know I have clients that are investigating the viewpoint of drilling properties that don't look any better than the Ford Zone or the 237 Zone on this property.

Q. So you remain of the opinion that subject to the conditions I have outlined, some responsible person might be found?

A. That is true.

Q. And that if they drill, there should be production in your opinion? [211]

A. Providing that too much time doesn't elapse when drainage would take place from those zones.

Mr. Cahill: No further questions.

Cross-Examination

By Mr. Lynch:

Q. You are still of that opinion, considering the experience of the Universal Consolidated Company, which is an old and reliable oil company?

A. I didn't express any opinion about the Universal Consolidated Oil Company.

Q. You are still of the opinion that in spite of the experience of the Universal Consolidated Oil Company, having spent many thousands of dollars in drilling this well in the depth it is drilled and having determined from that zone that oil cannot be produced at commercial quantities, are you still of the opinion that someone could be

(Testimony of Roy G. Mead)

found, knowing of that experience, who would go and drill a well in that zone?

A. Well, the action of what somebody else would do would depend on the geological conditions and on what data has heretofore been obtained by wells drilled.

Q. Including the experience of the Universal Consolidated Oil Company in drilling a well?

A. I wouldn't say that would make any difference one way or the other. I believe another operator would be [212] guided entirely by such facts as are obtained from wells that had been drilled and geological evidence.

Q. Can you suggest to me and to the Court any reason why the Universal Consolidated Oil Company, having drilled this well and determined it was not commercially profitable, would abandon it if they felt that it was?

A. Well, I wouldn't say that they have abandoned it; they can still take the plug out and run the casing in that well. So they haven't abandoned the well.

Q. They never intended to produce oil, did they?

A. They didn't run a string of pipe in the hole and cement it and perforate it so that it could be tested; that remains to be done.

Q. As a matter of fact, it is true, isn't it, that having withdrawn and plugged the hole, that they would have to redrill, if they were going to attempt to produce oil?

A. They would have to drill out the plug that they have put in, which is not a difficult matter, and clean the hole out and then it would be in the same position it was

(Testimony of Roy G. Mead)

in before they plugged it. They fill the hole up with mud and then put a plug in on top of the mud. That is easily cleaned out. They put a cement plug in, but they can drill the cement plug and that is done universally.

The Referee: But, in drilling through that type of soil, will the hole remain intact without piping or without some steel to reinforce it? [213]

The Witness: That formation that they drilled is a consolidated formation; it has sand beds and it will remain open; it wouldn't cave as long as they fill it with mud. When they drill the hole, they use rotary mud that cakes the hole and they put more mud, heavy mud, and then they put the plug on top of that.

Q. Can you suggest the names of anyone whom the Trustee might contact to determine whether or not they would be interested in drilling a well on this 6 acre property, to this so-called Ford Zone? Can you suggest the name of any person or corporation who might be interested?

A. No, I am not a broker and while I have clients I don't make it a practice to suggest any opportunities to my clients. That is more of a brokerage business.

Q. Would you suggest to the Trustee anyone that he could contact to find out whether they would be interested?

A. No, I wouldn't do that. If I were going to make any suggestions I would make it to clients of mine or people that I thought might be interested. I wouldn't act as a broker on the matter. That would weaken my position as a professional man.

Mr. Lynch: That is all.

Mr. Cahill: No further questions. [214]

H. F. METCALF,

having been previously duly sworn, was examined further and testified as follows:

Direct Examination

By Mr. Cahill:

Q. You have been heretofore sworn?

A. Yes.

Mr. Lynch: I might make this observation at this time, because it becomes appropriate from the testimony of the previous witness, that if Universal Consolidated Oil shall go in and reopen that hole, and drill in new wells, whatever rights the lessor has under this lease, that we still retain, that any new development by the Universal Consolidated Oil inures to our benefit.

By Mr. Cahill: Q. Mr. Metcalf, I find in the files of the Referee herein a letter which I am going to show you, to refresh your memory, possibly. The letter is dated January 16, 1946, addressed to Judge Hugh L. Dickson and it is in reference apparently to certain advertising that you did in numerous papers and I will ask you if that letter refers to advertising that was done in all those numerous papers described therein, in reference to this 6 acre parcel? A. Yes, it was, definitely.

Q. I notice also, Mr. Metcalf,—I will ask you [215] to read the third paragraph of that letter—let me read it for the purpose of the record.

“We have had a great many calls in answer to this advertisement. Very largely from brokers, but also others such as the Graham Brothers, Richfield Oil Company, the Case Company, and many others.”

Do you recall now that matter having been directed to your attention, that after you did run the advertise-

(Testimony of H. F. Metcalf)

ments in these numerous papers which you previously testified to, you gave a list and that is substantially the same list as herein, is it not? A. Correct.

Q. Do you recall having received, as stated in the last quoted sentence, "the calls from brokers, the Richfield Oil Company and others?"

A. Do I recall it?

Q. Yes.

A. Yes, I do; I had a good many calls at that time.

Q. It looks like you had received a very substantial response from those advertisements? A. Yes, fair.

Q. And those advertisements I think you previously testified were all run in the month of January of the year 1946?

A. I think that is correct, on or about that time. [216]

Q. Nothing further in reference to that matter, but in reference to another matter, I direct your attention now to a letter dated July 2, 1947, in the same file, addressed to the Referee herein signed by yourself and I direct your attention to the paragraph on page 2 of the letter which reads as follows:

"The writer has a tentative deal on the Procter & Gambel Company for the sale of the surface rights of the 6 acres of land in Channel No. 3. We have asked a price of \$374,000 for this, and the matter is now awaiting the outcome of a survey which is being made at the present time."

Having called that to your attention, I will ask you, Mr. Metcalf, if the recital contained therein, that a price of \$374,000 had been asked of Procter & Gamble for the property, is true? A. That is true.

(Testimony of H. F. Metcalf)

Q. And now, how did you on or about July 2, 1947, arrive at that price as an asking price?

A. I pulled it out of the air.

Q. Do you really mean that, Mr. Metcalf, from your experience as a realtor?

A. Mr. Counsel, I figured that I would ask as high a price as I could possibly ask and look them in the eye and subsequent to that my instructions were that they would [217] send an engineer out here which they did. I entertained him for two or three days. I have forgotten his name—Mr. Bergen could tell you—McWater was his name, I recall now. We drove down to the beach and we looked it over carefully. We had had, I think, previous to that a survey made of it showing the location of the wells. He was very anxious to know exactly where the wells were and how much ground was available for their purpose and after a rather exhaustive survey of the ground, he said that the price I had quoted was completely out of reason so far as they were concerned. I followed that up and questioned him as to what he thought it was possibly worth to him. He said \$180,000 was the best offer that he would make to the Court and I pressed him for a higher offer and he said no, that is the best offer that I can make to my house with a clear conscience. Later on, Mr. Bergen or his associate, Mr. O'Melveny raised that price \$5,000, making it \$185,000. I demurred at that. I said the price I am creditably informed is too low. He said he would pay a much higher price if they could use the property. But he said the location of the wells precluded any very appreciable use of it until the long future. I said you have 150 feet of waterfront and he said, we don't need any waterfront. We have 1200 feet

(Testimony of H. F. Metcalf)

where we are and we don't need any. And, he insisted that the only use they had was a soft ball diamond to be put on Seventh Street. As Your Honor knows, we submitted the [218] check here and the check was returned to Mr. O'Melveny in Mr. Bergen's absence.

They subsequently offered Your Honor \$198,000.

I have had a great many calls on this. I had one man who said he might take it for \$200,000 and without any reclamatory work on it provided we could move or obliterate Well No. 6. That didn't seem feasible. I got a price of it after many discussions with Tommy Williams and Mr. Starr and it didn't seem a feasible thing and it would put it out of reason. I had other calls, Graham Brothers, the Richfield Oil Company. I don't recall any others. I had a good many Long Beach brokers who spotted my ad and came in to see what could be done. I submitted this to them and they all said almost with one accord that the distribution of oil wells is such as to preclude the complete use of the property for 15 years and that is too long to wait.

Q. When you say, as you just have, that brokers came in, in response to your ad, you are referring to the series of advertisements run in the month of January, 1946?

A. That is right.

Q. Is it fair to state, Mr. Metcalf, that when you wrote this letter on July 2, 1947, that you were of the opinion that \$374,000 represented approximately the highest maximum price which you might expect to obtain for this property?

A. Mr. Counsel, I didn't expect to get that price [219] at all. But, in common, in this rather tricky market, I felt that I could easily come down but I couldn't go up.

(Testimony of H. F. Metcalf)

I didn't expect to get that price but I figured I would ask plenty for it and see what developed.

Q. You did expect, however, to get somewhere close to \$374,000, did you not?

A. I don't recall that I did. I was totally at sea as to what this would bring. It depends on getting some peculiar set-up that can use that kind of a lot and are willing to wait 15 years for the rest of it. I think it is almost certain from such information as I could get from experts that the property will be productive for 15 years; at least, that has been the general opinion from Mr. Carrey and others.

Q. It is possible, is it not, Mr. Metcalf, that the wells, in the place, as they are, can still find some individual or company who might be able to utilize the surface rights during that 15 years?

Mr. Lynch: We have got an offer here from people that will pay for it and use what surface rights they can get under an arrangement with the Universal Consolidated Company.

The Witness: I have been industriously looking for someone who could use Channel No. 3. We kept 500 feet of frontage there, 150 feet deep clear of encumbrance. We kept a foot roadway there. That is a kind of a client to look for. Don't waste your time looking for somebody who [220] has to have huge buildings on this lot because Mr. Starr will object to them if they come too close to his wells and it is not good. The lots are divided in such a way that you can't get big buildings in there. That is not proper. Now, I have been trying throughout this whole deal to find somebody who could use the water-front because that is unencumbered and that is valuable.

(Testimony of H. F. Metcalf)

Q. By Mr. Cahill: Let me develop that just a moment. As I understand you, the Trustee reserved at the time you made the oil lease, a parcel of land which is the 500 feet of waterfront, to a depth of 150 feet, upon which no wells were placed or tanks placed thereon, is that correct? A. That is correct, yes, sir.

Q. Is that piece available?

A. That piece is available for us if and when it is properly bulkheaded and filled. By the way, I got tentative prices greatly in excess of what has been testified to in this court. I am not attempting to testify to that at this time. But, I think they can build a proper bulkhead for \$100,000, although I don't think so, maybe more nearly \$200,000 for a proper bulkhead.

Q. Whoever goes in there wants to use the waterfront itself to bring in a vessel. They will have to build there a certain particular type of piling and wharfage for the unloading of vessels. [221]

A. It is only concrete piling properly protected against washings, that is all. Or it could be made of wooden piling. I don't think concrete is absolutely necessary.

Q. I find a reference here—

Mr. Lynch: I object to the witness being examined as to a letter not in evidence. Why don't you put it in evidence?

The Referee: It is in my file.

Mr. Cahill: I will offer the letter. I will offer the letter of July 2. I did want to direct the attention of the witness to one sentence in reference to refinancing.

“Another matter which to some extent has delayed the closing of the estate, is the fact that the property has been appraised by money-loaners who have agreed to loan the sum of \$400,000 for the entire estate.”

(Testimony of H. F. Metcalf)

I ask you what knowledge you have of the proposed refinancing?

A. I had very little information up until a month ago and then I asked Mr. Newport who was conducting that, to take me to his principals which he did and we had a very pleasant interview and I found the Western Insurance Company—I think it was Western States Life Insurance Company of Sacramento—in the hands of very nice competent people who seemed to be very friendly to Mr. Newport and perfectly [222] willing to loan him \$400,000 and before we left, I got the idea they would have loaned him \$425,000, possibly, but as a part of the condition precedent, they wanted this affair taken out of the Bankruptcy Court.

Q. In other words, it would be a loan available only to the reorganized corporation and not to the Trustee in bankruptcy?

A. That is correct.

Q. And also it would include this 6 acres?

A. Yes, and he deprecated somewhat our selling this 6 acres. I couldn't tell whether it was a matter of great interest to him or whether he had been promoted into that or what, but he seemed to think that perhaps we were selling a little too cheap. He didn't state so very emphatically. By the way, I have my own ideas of how this can be refinanced, based on this sale. I will be very glad to tell Your Honor if it is a matter of interest to anybody.

The Referee: I have been hearing that so long, that I would like to see something actually happen. I have been hearing refinancing ever since I got this case two years ago. We just need to sell some property. Quit sitting on your hands and get around and sell some. Isn't it true that anything in the world you have to sell is worth what you can get for it?

(Testimony of H. F. Metcalf)

The Witness: It is often worth more than you can get [223] for it.

The Referee: Not being obliged to sell on a fair, open market, isn't it worth what the other man is willing to pay?

The Witness: Yes, that is the classical definition, I believe, Your Honor.

Mr. Cahill: I have no further questions.

Mr. Lynch: No questions.

J. B. GRIBBLE,

having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cahill:

Q. Mr. Gribble, you are the auditor for the Trustee in this matter? A. Yes, sir.

Q. Are you familiar with the records of the income from the oil property? A. Yes, sir.

Q. Are you able to advise the Court as to the present income, that is the Trustee's income from the 6 acre parcel? A. Yes, sir.

Q. What is it, please? [224]

A. Which month do you want, Mr. Cahill? I have it by years for 1944, 1945, 1946, and for the 10 months of 1947.

Q. Will you give us the 10 months of 1947?

A. The 35 per cent royalty accruing to the Trustee for the 10 months of 1947 was \$21,133.18.

Q. Apparently, just a trifle over \$25,000 a year at the present time?

A. It will be just slightly over that, yes, sir.

(Testimony of J. B. Gribble)

Q. Is that higher or lower than the year 1946?

A. That is higher.

Q. And why is it higher?

A. There have been two price increases this year.

Q. And this is only from the 6 acre parcel?

A. Yes, sir.

Mr. Lynch: I can't see the materiality of this. After all we are retaining that. Why waste the time of going into that? And how much are we retaining for the oil; we still retain it.

The Referee: It might be eliminated. How many years would it take us to pay off the bank. The bank has a claim here, I understand, for \$320,000.

What was it in 1946?

The Witness: The 35 per cent royalty was \$20,032.84. For 1945, the 35 per cent royalty was \$20,530.32.

Q. Mr. Gribble, in reference to the proposed sale [225] to Procter & Gamble at a price of \$198,000, less the deduction to be made for the removal of the tank, have you made any calculation as to what income tax on that sale would be chargeable against the estate?

A. Yes, sir.

Q. Will you state it, please?

A. After making the deduction for the cost of removal of the equipment as testified to by Mr. Metcalf, which was \$20,378, allowing for escrow fees, title policy, et cetera, the tax would be, the way I estimate it, \$20,761.18.

The Referee: That would be a tax upon the increased value.

The Witness: It is a tax over our original cost.

Mr. Cahill: I have no further questions.

Mr. Lynch: I have no questions.

Mr. Iverson: No questions.

H. G. NEWPORT,

having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cahill:

Q. What is your name?

A. H. G. Newport. [226]

Q. You are the president of the bankrupt corporation?

A. I am.

Q. What is your business or occupation?

A. Real estate broker.

Q. How long have you been such a broker?

A. Over 40 years.

Q. And in California? A. Yes.

Q. You have engaged in the purchase and sale of real estate on your own behalf during that period?

A. Yes.

Q. Have you also engaged actively in selling lands for others? A. To some extent, yes.

Q. And have you also engaged in the appraisal of lands? A. Yes.

Q. Have you appraised heretofore in the District Courts of the United States? A. Yes.

Q. In the Superior Court of the State of California?

A. Yes.

Q. Are you acting as appraiser now for the Federal Court in any manner? A. I am. [227]

Q. Where? A. In Mr. Laugharn's court.

Q. You are of course acquainted with the 6 acre parcel of land? A. I am.

Q. Did you purchase that parcel on behalf and for your company? A. I did.

(Testimony of H. G. Newport)

Q. When? A. On February 13, 1913.

Q. You have been familiar with the parcel of land at all times since then? A. I have.

Q. Are you familiar, Mr. Newport, with the present development of Long Beach Harbor? A. I am.

Q. Have you had occasion in recent years—I will limit that to not exceeding the last 36 months—to making a study of the plans of the City of Long Beach for the development of its harbor? A. I have.

Q. Are you familiar with the sales of property that have been made in Long Beach Harbor area, particularly in reference to waterfront property? A. I am.

Q. Over what period? [228] A. 30 years.

Q. Do you have an opinion as to the value of the surface rights of the 6 acre parcel? A. I do.

Q. Will you state the value in your opinion?

A. The fair value of the 6 acres is \$391,000.

Q. Directing your attention to another matter, Mr. Newport, namely the matter of the proposed financing, will you state to the Court whether you have negotiated a loan to be made to the organized corporation?

A. I have.

Q. And with whom?

A. With the life insurance company.

Q. Will you state its full and correct name?

A. California Western States Life, Sacramento, California.

Q. And does that loan contemplate to cover the first lien upon all of the assets of the corporation now in the hands of the Trustee in bankruptcy? A. It does.

Q. Including this 6 acre parcel? A. It does.

(Testimony of H. G. Newport)

Q. Have you received any communication from that company in reference to the proposed sale to Procter & Gamble as to their willingness or unwillingness to proceed with the loan in the event that such a sale is made? [229]

A. I have.

Q. Do you have that communication with you?

A. I have the communication here.

The Referee: How much do they propose to lend you, Mr. Newport? How much have they agreed, if they have agreed to lend you?

The Witness: Let me explain, Your Honor. Along in December last year I contacted Mr. Johnson who appeared before you in court. He was the chief appraiser for the life insurance company. The matter was taken up with Mr. Johnson at which time the matter was discussed and Mr. Wright, who was the vice president of the company, together with Mr. Bryer, drove over the various properties and approved the loan at that time for \$400,000. The matter was discussed when it came up relative to a question as to whether our taxes with the government had been settled. At that time they were under negotiations and Mr. Wright told me—he said, “Until you get that out of the road, Mr. Newport, there is no use talking to us as we want to settle that definitely.” I think, along in January, there was a part settlement made and I think the matter was completely settled along either in April or May. That was the No. 1 proposition on the road. The matter was then discussed and I think Mr. Metcalf went over to the bank and there seemed to be some sort of an agreement with the bank that they would accept \$250,000. [230]

The Referee: Let me cite this to you. I have heard all that a million times from you and from Mr. Metcalf.

(Testimony of H. G. Newport)

What I want to know now is what amount of money did the California Western Life Insurance Company agree to lend you on these properties. Mr. Metcalf, you and I have discussed the bank's attitude in not reducing their loan several times. I am familiar with that. What I want to know now is what can you borrow from this California Insurance Company?

The Witness: I would say a minimum of \$400,000.

The Referee: Does that clear you out with the bank, out of the bankruptcy court?

The Witness: It will do this, Your Honor.

The Referee: You can answer that yes or no, and explain later.

The Witness: I think it would.

The Referee: You owe the bank \$320,000.

The Witness: They have agreed to accept \$310,000.

Mr. Iverson: Who agreed to that?

The Witness: I don't know; I am just taking Mr. Metcalf's word.

Mr. Metcalf: Mr. Craig, the executive vice president of the Security Bank agreed to accept \$310,000.

Mr. Lynch: That is correct, \$310,000, plus the interest.

Mr. Metcalf: Plus interest that might accrue until it [231] was paid.

The Witness: Then the matter was taken up with the Bank of America and they agreed to accept \$51,000.

The Referee: Bank of America, \$51,000; that makes it \$361,000 altogether then?

Mr. Lynch: They have an unsecured claim.

Mr. Iverson: We have an unsecured claim of \$64,000.

(Testimony of H. G. Newport)

Mr. Lynch: \$85,000 administration expenses accrued to date. That does not take into consideration such amount as may be allowed.

The Referee: That is \$507,000.

Mr. Iverson: The Bank of America has a mortgage on 37 acres up in the Verdugo Mountains. That was taken under permission of the Court and then before the 5-year period ran out permission was given to renew it by another one. Taxes and advances on top of that with interest and so on bring that obligation up to \$90,000. Because, it runs back many years. We refrained from foreclosing because we didn't want to precipitate any trouble here. The bank is willing to take \$51,000 and forget the rest of it.

Mr. Lynch: You mean withdraw its unsecured claim?

Mr. Iverson: No, not the unsecured claim.

Mr. Lynch: There are nearly \$200,000 worth of unsecured claims. Obviously, if you are going to settle, you will have to settle with the unsecured as well as the secured, to make some compromise. [232]

Mr. Nelson: I don't exactly know what the unsecured claims amount to. My impression is that they are altogether over \$200,00. Now, Mr. Newport's idea is that if he should have funds to pay off the liens, actual liens on the property, expenses of administration, that he could then make a compromise or settlement of the unsecured claims on the basis of a deferred liability. He wouldn't to evade the liability. It would be in the nature of a reorganization. You will have to divert the procedure. The unsecured creditors have waited a long time and they are entitled to their money.

(Testimony of H. G. Newport)

Q. By Mr. Cahill: Mr. Newport, this \$400,000 loan, did that contemplate a plan of reorganization through the court? A. Yes, sir.

Q. Which would be under Chapter 10 of the National Bankruptcy Act? A. Yes.

Q. And under such proposed plan, the unsecured creditors would be given either a junior security or a preferred stock or something of that kind; is that the plan?

A. That is the plan. In addition to that there is available by one of the contractors additional sums of \$75,000 credits. In other words, what we need to do with [233] the Newport picture, is to get it operating and I think by subdividing some of these properties we would be in a position to pay these creditors all off in a year and half or two years.

Q. Let me ask you this. Part of the plan of the life insurance company in making this loan is not only to get this matter out of bankruptcy but also to make it a going concern? A. Yes.

Q. And as a going concern it regarded the necessity of having certain working capital in the sum of \$75,000?

A. That is correct.

Q. And the purpose of that \$75,000 was to place under subdivision the land in the Verdugo Woodlands which has been held for a prospect of subdivision for so long? A. That is correct.

Q. And did you request Lawrence M. Cahill, Attorney at Law to negotiate with his clients, the Haddock Construction Company, Limited, Pasadena, for \$75,000 credit whereby you would in effect or rather the reorganized corporation would have available that sum of money as working capital in reference to this proposed new subdivision? A. I did.

(Testimony of H. G. Newport)

Q. And up to the time and about the time this proposed sale to Procter & Gamble came into this court, had you completed those negotiations with Mr. Had-dock? [234] A. I had.

Q. And was it in the process, when this offer came in, of drawing papers in reference to that? A. It was.

Mr. Cahill: That is all.

Mr. Lynch: I have no questions.

Cross-Examination

By Mr. Iverson:

Q. Mr. Newport, you have set the fair market value of this property at \$391,000. That is approximately \$65,000 an acre? A. Approximately that.

Q. Can you state to the Court in your experience has there ever been similar property in the Los Angeles Harbor area sold for that amount of money?

A. There have been very few sales of property in the Long Beach Harbor area. It was all comparable. A lot of sales have been made—like going back to the Model T Ford a good many years ago—

Q. Will you answer the question, please? Has there ever been a property sold in Los Angeles Harbor for \$65,000 an acre?

A. I would break the sale down. In other words in the Spreckels property—

Q. Will you answer the question yes or no? [235]

A. Yes, I think so. I have a right to break the sale down; in other words, it is perfectly legitimate.

Q. How many acres were there in the Spreckels property? A. I think 37 acres.

(Testimony of H. G. Newport)

Q. That sold for \$27,476 an acre, isn't that right?

A. I would say somewhere in the neighborhood of that figure.

Q. Going to this refinancing, as a matter of fact, Mr. Newport, in 1935, 12 years ago, when the Security-First National Bank was before Judge McCormick, asking for permission to foreclose on your assets, you at that time stated to Judge McCormick that you had a refinance program, did you not?

A. We thought we did with the R. F. C.

Q. And you so stated to Judge McCormick?

A. I did.

Q. And in 1942 when this matter was before Referee Utley and there was a proposed sale of the San Fernando property, you stated then that you had a refinancing program?

A. Yes, at that time we were negotiating it.

Q. And you stated before Referee Utley that you had a refinancing program?

A. We stated the loan was being negotiated.

Q. And in 1944, before Referee Utley, when the Security Bank was again trying to foreclose, you stated to [236] Referee Utley that you had a refinancing program, didn't you?

A. I said we were negotiating one; I didn't state it.

Mr. Iverson: That is all.

Redirect Examination

By Mr. Cahill:

Q. Mr. Newport, in reference to the Spreckels property, how many acres of that property is not water-front property? A. In the neighborhood of 26 acres.

Q. Has no frontage at all? A. That is correct.

(Testimony of H. G. Newport)

Q. And what, in your opinion, is the 26 acres worth?

A. The 26 acres running back 500 feet is worth \$1.50 a square foot. I can give you a little history, if you wish.

Q. No, I don't want a history. What, in your opinion, are the 26 acres which is not waterfront property worth?

A. I wouldn't put it at more than 50 cents a square foot.

Q. \$1 a square foot for the frontage?

A. That is correct. [237]

Mr. Cahill: That is all.

Recross-Examination

By Mr. Lynch:

Q. Mr. Newport, you say it is not waterfront property; you mean you arbitrarily are taking 500 feet as being what you consider waterfront property and the balance you say is not waterfront property, is that right?

A. That is right.

Q. You are of the opinion that 500 feet of the property is waterfront property and the balance of it you consider is not waterfront property?

A. That is right.

Q. As a matter of fact, it is all contiguous property, one piece property?

A. I guess so.

Redirect Examination

By Mr. Cahill:

Q. As a matter of fact, Mr. Newport, it is three separate parcels, is it not, two parcels separated by the railroad right-of-way?

A. That is correct.

Mr. Cahill: No further questions.

I have nothing further to present, Your Honor.

Mr. Lynch: The Trustee has nothing further. [238]

Mr. Iverson: I have a little evidence to present.

R. T. ADAMS,

having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Iverson:

Q. State your name. A. R. T. Adams.

Q. What is your occupation?

A. Assistant vice president of the Security-First National Bank.

Q. In your position have you had charge of the F. P. Newport loan in the Security-First National Bank?

A. I have since May of 1933.

Q. Will you state to the Court the amount that is still due and unpaid by the F. P. Newport Corporation to the Security-First National Bank?

A. As of November 20, 1947—and I believe it is the same figure now—\$320,222.85.

Q. Can you state how much has been received by the bank since January 3, 1946, on account of this obligation, on account of the principal?

A. We have received in the period between January 1, 1946, and November 20, 1947, \$83,484.58. [239]

Q. How much of that did you receive from the oil income on the property? A. \$37,253.38.

Q. And how much did you receive from liquidation of assets? A. \$46,232.

Mr. Iverson: That is all.

Cross-Examination

By Mr. Nelson:

Q. Mr. Adams, was that \$83,000 realized on the principal? A. Yes.

(Testimony of R. T. Adams)

Q. And in addition to that, interest was paid, was it not? A. That is correct.

Q. The bankrupt corporation also paid taxes on the encumbered property? A. That is correct.

Q. And it also paid an income tax settlement with the Government during this year, during the early part of the year, did it not, on a compromised basis?

A. An income tax settlement was made with the Government; I have forgotten the date.

Q. Wasn't the settlement something in the neighborhood of \$16,000? [240]

A. It wasn't that much, I can assure you of that. I think it was \$52,000. That figure sticks in my memory.

Mr. Newport: \$56,000.

The Witness: The point is, Mr. Nelson, that the oil income has been used to pay income taxes and oil taxes and no income has accrued out of the real estate sales. Only \$46,000 has come from real estate sales.

The Referee: Since this case was filed?

The Witness: During this period from January 1 of 1946. I haven't got the figures accurately, but I would guess that there has only been a total of about \$200,000 of liquidation that has come from real estate sales. The rest of it and the carrying costs have all come from the oil that was fortunately discovered under this property.

By Mr. Nelson: Q. You have been supplied monthly with oil returns, haven't you, Universal Consolidated Oil Company returns?

A. We get both a weekly return from Mr. Carrey who employs Shephard Pendleton, Limited and then we also get a monthly return from him and from the oil company, yes, sir.

(Testimony of R. T. Adams)

Q. And the amount of oil that is being produced on those wells is diminishing at all times, isn't it?

A. It has been steadily going down as is natural when water comes into a well and as the supply of oil is gradually depleted. [241]

Cross-Examination

By Mr. Cahill:

Q. Strangely, the oil income has been increasing?

A. The oil income has been increasing recently because of an increase in price, but the production of oil is down per barrel.

Mr. Cahill: That is right. Thank you, Mr. Haddock.

Redirect Examination

By Mr. Iverson:

Q. You don't feel now that the bank is in any jeopardy; that is, the loan isn't in any jeopardy with respect to the sufficiency of the security for it?

A. I wouldn't go that far. If we are asked to continue to speculate for the benefit of the unsecured creditors to a point definitely, the present boom will pass us by and what you can do with unproductive real estate is anybody's guess. This company got into bankruptcy in the beginning because they didn't have income enough to pay their carrying costs and if this thing goes far enough the same thing can recur again. If we can liquidate today without doubt we can get our money and the unsecured creditors perhaps get something. But that can change any minute.

(This concludes all the testimony in the case. Argument that ensued left out by request of counsel.)

[Endorsed]: Filed Mar. 1, 1948. Edmund L. Smith, Clerk. [242]

[Title of District Court and Cause]

Before the Honorable Hugh L. Dickson,
Referee in Bankruptcy

A PARTIAL TRANSCRIPT IN RE JOSEPH
SATTLER COMMISSION ON SALE OF
REAL PROPERTY

Los Angeles, California, December 1, 1947

* * * * * * * *

Mr. Lynch: I am not sure what the answer is, but Mr. Metcalf has not made any agreement or arrangement with anyone for the payment of any commission. But, there has been some discussion about the payment of a commission and I think the Court talked to the man.

The Referee: I talked to a gentleman back there and told him that if he contacted a buyer, I would see that he got compensation for his time and his license as a broker, and the compensation I told him should not exceed \$5,000, regardless of what the price was. I told him, regardless of the price, that I would see that he got compensated for his producing a purchaser, not to exceed \$5,000.

Mr. Lynch: Do I understand that this gentleman did produce this person here?

The Referee: He contacted the Proctor and Gamble people.

Proctor and Gamble Representative: He was the finder and we have handled the negotiations from that point.

Mr. Cahill: When did that compensation take place?

The Referee: It was in 1946 when the first Proctor and Gamble offer came in. As I recall, the Proctor and Gamble people in 1946 made the first offer and then the Los Angeles Soap Company made a higher offer. [2]

Mr. Lynch: I think that is correct.

Mr. Metcalf: I don't recall that Proctor and Gamble ever made an offer at that time, when they were contacted and expressed some interest, Your Honor.

The Referee: It was something like \$80,000. Anyway, I know later, this gentleman went to the Southern Pacific man and talked to them about it and I think he talked to you, Mr. Metcalf.

Mr. Metcalf: This man has never talked to me about this deal.

Mr. Lynch: May we have your card for the reporter here? (Addressing the broker, Mr. Sattler)

The Referee: He has produced this buyer, if it be a buyer, through his efforts.

Mr. Metcalf: I would like to comment on the fact that those commissions are being paid. The only possible way I consider that they can sell property in La Crescenta and Verdugo Woodlands is to employ brokers. And, I can do better work through a broker than I can direct.

Mr. Lynch: (Reading from a card handed to him by Mr. Sattler)

"Joseph Sattler, 218, H. W. Hellman Building, Los Angeles, California—Permit No. 11732, License Number."

[Endorsed]: Filed Mar. 29, 1948. Edmund L. Smith, Clerk. [3]

[Title of District Court and Cause]

Honorable Charles C. Cavanah, Judge Presiding
REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California.

Date: April 26, 1948.

Appearances:

For Petitioners Dorothy Day, et al.: L. M. Cahill,
Esquire.

For Trustee, H. F. Metcalf: Allen T. Lynch, Esquire.

For Procter & Gamble Mfg. Company: O'Melveny &
Myers, by Richard C. Bergen, Esquire, Edward C. Freu-
tel, Jr., Esquire, T. O. McCraney, Esquire.

For B. B. Robinson, Mortimer A. Kline, Esquire.

Los Angeles, California, Monday, April 26, 1948.
10:00 A. M.

The Clerk: 25308-M. In re: F. P. Newport Cor-
poration, Ltd., bankrupt.

Mr. Lynch: Ready for the trustee.

The Court: You may proceed.

Mr. Cahill: I am informed that certain negotiations
are under way as to which I am not fully informed, but
it appears if consummated they would be to the benefit
of the estate and creditors.

I am informed this morning, though, apparently, so far
as I know at this time, that all parties are desirous that
the matter on your Honor's calendar be continued for a
period of two weeks.

The Court: I cannot do that. I am leaving here to-
morrow night, and I will have to turn this matter over
then to another judge. I have given you six months.

The trustee indicated to me he would get another bid by that time, other than presented to the referee. I come here and I find another request for continuance. Negotiations are going on, you say.

I do not want to go away without ruling on this matter that is before me, one way or the other, this morning. Otherwise, another judge will have to start all over again. I feel I have to rule one way or the other. [2]

I gave you, I think, six weeks or something like that, because the trustee felt he would have negotiations completed. Now, I come here and there is another headache. We will never get anywhere that way, in completing a lawsuit.

Mr. Lynch: If the Court please, so far as the trustee is concerned, I wish to advise that the trustee has not been able to obtain any better bid. There are now negotiations in progress. Mr. Mortimer Kline represents a party who is interested, and particularly asked for this continuance. The Procter & Gamble people and the Security-First National Bank people have agreed to the continuance.

The Court: You agreed to a continuance on both sides—

Mr. Lynch: Mr. Kline is here. I don't know whether he has any—

Mr. Kline: Would you care to hear me for a moment?

The Court: Yes.

Mr. Kline: There is presently before Your Honor the question of confirming the sale of a six-acre parcel, which involves certain surface rights.

The offer that has been made on behalf of the Procter & Gamble Company states that the sale, to-wit, of this

surface, will convey all mineral rights and be subject only to an existing oil and gas lease. This oil and gas lease has a fixed term to run.

On this six acres there are six producing wells, the [3] income from which inures to the interest of this bankrupt estate. If this sale is consummated to the Procter & Gamble Company, the sale of the surface rights, which is the basic interest that it is acquiring, it will have the effect, in my opinion—and I think it is shared by certain of the others, including those who are representing Procter & Gamble—it would have the effect of greatly destroying the value of the oil rights, for the simple reason, if Procter & Gamble for the purchase price of the surface rights can obtain the reversionary mineral rights without any consideration therefor, so at the termination of the existing lease, whether that be day after tomorrow or five years or ten years, or the term of the lease, will have the effect of adding to their value many, many hundreds of thousands of dollars, and taking away from the bankrupt estate the ability to obtain a higher price for the mineral rights.

I represent a responsible purchaser, who is interested in acquiring the mineral rights, Your Honor, and who will pay a substantial consideration therefor, provided he can obtain the mineral rights and the right to produce the oil, which is within that property, for as long a period of time as the oil can be produced therefrom on an economical basis.

Procter & Gamble, through its representative, will tell you here today they are interested solely in surface rights and not in mineral rights. They only wish this reversionary [4] mineral right in order that they might be protected in their surface rights. We have been talking with

them, with the idea in mind of visting the property and sitting around a table, and that we could work out an arrangement whereby they can enjoy their full surface rights, and at the same time give up any mineral interests they might acquire under this purchase and thus, if the mineral rights are offered for sale, unrestricted, except to the extent that an agreement is made with respect to the surface use, the mineral rights will bring a much greater price in this court.

I might say that if such an agreement cannot be reached or if this Court sells the property to Procter and Gamble with this reversionary mineral right, the price which any responsible purchaser would pay for these mineral rights would be a fraction only of that which can be obtained if the full mineral rights can be granted.

We just came into this matter within the last several days, and I can assure Your Honor it is not with the idea of a delay or taking up this Court's time that we respectfully ask, in the interest of the bankrupt estate, as well as in the interest of my client who wishes to purchase and bid for this property, that the matter be delayed a period of two weeks, during which time we can definitely crystalize our views and will make a definite offer to Your Honor.

The Court: Is there anything further? [5]

Mr. Bergen: On behalf of Procter & Gamble Company, we agreed we would not object to this continuance, if there is a bona fide interest in this mineral right, and if anything reasonable can be worked out so that we can still get what we want, namely, the surface uncluttered by oil wells and like matters at the time we thought we were going to get them. We are perfectly happy to nego-

tiate to that end. We will do that whether or not this is confirmed this morning.

If Your Honor feels that he must, nevertheless, proceed, we will still be perfectly happy to sit down with the appropriate parties to try to work out anything that is fair.

The Court: This matter before the Court now on review of a sale, confirmed by the Referee, of \$198,000.00, had a hearing. Evidence was taken. The matter was presented to the Court and the trustee came in and asked that the Court give him further time, that he had some faith in the fact that he could receive a better bid than \$198,000.00.

I granted that request. I think that was some five or six weeks ago, or more than that. I fixed this date.

Now we come in here and we are confronted with the same atmosphere as then. We are in doubt whether the bid will be made or for how much, or whether it will be more than the bid I am to review this morning, or the Referee. It is the same situation.

Of course, all the parties agree to keep continuing this, [6] and you will never bring an end to the rights of people involved here.

Now, I think the Court has been fair with you and given you plenty of time and granted your requests. Now I am confronted with another request, that if certain things happen we will consider another bid. It is the same situation I had before me before.

The matter was presented to me and left open for that one purpose, and that one purpose alone, for me to consider. I feel I have to rule on this matter one way or another, either reverse this Referee's decision and confirm the sale, or not confirm it.

You come here and keep asking for continuances. I don't think that is fair to the Court, gentlemen. I have granted everything you have requested so far, and given you time to take care of it. Objections were made here by the creditors to confirming this sale. I took the review in this court. I heard your evidence on it. That is the status of the record up to this time.

The trustee went on the stand and said he had faith in receiving another bid. I think he said there was probably one for \$500,000.00, and probably one for \$700,000.00. I think those are the figures he related here. He had some faith in it, by reason of I don't know what. Anyway, he had it in his mind. I granted time to see if he could get a better bid than [7] \$198,000.00, the bid before me to review, the sale the Referee confirmed.

I am leaving tomorrow night, and I have to leave. If I grant your continuance here, and a new judge comes in, he will have to go over what I have done and hear the evidence and start all over again. I have been handling this matter, I think, for six weeks.

Mr. Lynch: Approximately six weeks ago, Your Honor.

The Court: That is what my recollection is. I granted the request for all the parties. I am here for another request, a request for continuance, and to pass it over to another judge and let him retry it. That is not the way to help justice, gentlemen.

When you are given full opportunity to do business, try to do it and let the Court know you can or cannot.

Mr. Lynch: I appreciate the Court's liberality in this matter very much. The Court has been very considerate of the trustee.

I may say, so far as the trustee in bankruptcy is concerned, his interest is as a trustee for the benefit of all the creditors. He is trying to do his level best that he can do to get the ultimate out of the property for the benefit of those interested in the estate.

One of the problems that has always confronted us in this particular estate is the matter of liability for income tax [8] in the event of a sale.

Mr. Metcalf hands me this morning a telegram from Paul Ziffern, who was in Washington and took up with the Treasury Department the question of whether or not the sale of all the property would be considered a sale in the ordinary course of business, and subject to tax, and whether it would be considered purely a liquidation sale.

This wire is addressed to Mr. Metcalf and received by him this morning. It says:

"Am in process of trying to secure new Treasury ruling. Cannot hope for any official statement of position for at least another week. Would it be possible to postpone action on proposed sale awaiting possible Treasury action, since sale might radically change picture for prospective purchasers of entire assets? Will contact you tomorrow. Paul Ziffern."

Mr. Cahill: Your Honor, will you entertain a motion to hear the trustee at this time?

The Court: He has not the bid. He is in hopes of getting one, if we keep putting it off. That is the report.

Mr. Cahill: There is another aspect to it. One of the very serious objections that the creditors had to this sale was confirmed by the Referee, and that was the very nature of the sale, which would tend to reduce sharply the value of the estate in this, the unconveyed and unsold mineral rights. [9] They would be placed in jeopardy, as to their full recovery.

As I understand, Your Honor is now informed, or prepared to receive evidence by the trustee to show there is a proposed purchaser for the mineral rights at this time; the client represented by Mr. Kline. If that can be consummated, and he indicates on behalf of his client it can be apparently through the cooperation of the proposed buyer, Procter & Gamble, but if those two things can be coordinated—apparently there is a belief on the part of some that they can; I am not at all advised in the matter—the estate would greatly benefit.

I would like very much to have an opportunity to have the trustee, who apparently is fully informed, convey the exact information to Your Honor.

The Court: You are stating what he will testify?

Mr. Cahill: No, I am not, I haven't talked to Mr. Metcalf, the trustee.

The Court: Call him, then.

Mr. Cahill: I had only a few brief words as counsel.

H. F. METCALF,

a witness called by and on behalf of certain petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: H. F. Metcalf. [10]

By Mr. Cahill:

Q. Mr. Metcalf, you are the trustee in bankruptcy in this matter? A. Yes, sir.

Q. You have heretofore testified in this court in this proceeding? A. Yes, sir.

Q. In this particular proceeding before us this morning. Will you relate briefly to the Court what has transpired since the last hearing before this Court in this matter, which you think would indicate that the estate might be benefited by any new matters that have developed?

A. When the Court so kindly gave me five weeks more, I went to work. We have developed at the present time about five possible buyers, either for the oil or the nine acres, or for the entire estate.

Two or three of the contacts I made were interested in capital gain only and would not buy other than the entire assets. I think probably a deal could be worked out with any one of them.

But, Your Honor, here is the blind alley I get into; now, I had a tentative offer the other day that could have paid—all for the oil only under the nine acres—that would have paid all of the debts of the estate except some of the unsecured creditors, and would leave a very considerable

(Testimony of H. F. Metcalf)

amount [11] of the estate intact; way over enough to pay them.

But, Your Honor, I run into these confiscatory taxes—if I use the proper word, maybe not. That is what it amounts to. The taxes, I am advised by my auditor, amount to about 42 per cent, and it leaves pretty nearly a hopeless situation.

Now, Thursday one of the men who is attempting to buy, Arthur Newfield by name, who has a client who is attempting to buy the estate or some very considerable part of it—and I am sure means business—telephoned me from Beverly that Paul Ziffert, of the law firm of Swarts, Tannenbaum & Ziffert, that he was going to Washington that night—he was flying—and he was a former employee of that department in Washington that handles these things and would be very glad indeed to take up tentatively the matter of whether or not this estate might be placed in some other category, such as liquidating category, wherein they would be subject to only normal or very light taxes.

I told him that I couldn't contract with him for any payment without the Court's order. He said he would be glad to go without any.

He reached Washington Friday morning and he contacted these people Friday and sent me this telegram Saturday.

Your Honor, I am not here asking any favors of your Honor. You were very kind to give me the time you did, and it was used profitably. I couldn't work out a deal. [12]

Now I have a list in my pocket of people. All of them have expressed a very active interest in this estate, either

(Testimony of H. F. Metcalf)

for the oil and the acreage under which the oil is situated, or for the entire assets of the estate. Among them is an attorney named Stanley, and an attorney named George Rayboth who claims to represent people who have money and are eager to buy, and Mr. Arthur Newfield.

I contacted a firm in New York, who I was led to believe would loan us the money, which is the ideal way to close up this estate. But Masden & Company of New York sent a man out named Kaplan, out to see me. He said they were not interested in loans, but would buy the entire assets of the estate.

If Your Honor please, I am going to be careful about whatever you order. The sale, if it is made to Procter & Gamble, under proper conditions, might be a good sale. I don't know.

Q. Mr. Metcalf, I direct your attention to the statement made to the Court by Mr. Kline. You heard the statement made by him? A. Yes, I did.

Q. Were you negotiating with his client for the sale of the oil rights only?

A. I believe that is true. I have had very little dealing with Mr. Kline. He has been dealing with either Mr. Newport or myself or you. I am getting a little confused, Mr. Attorney. I have got six or eight people; I have been [13] working on this definitely. I have used the phones incessantly, trying to dig up a purchaser who has the money and is willing to deal.

Q. You remain of the opinion, Mr. Metcalf, as you testified the last time you were here, that the present proposed sale to Procter & Gamble does endanger the recoverable oil?

A. It would do this: You could still sell the oil rights. I don't think it would spoil their salability, except that

(Testimony of H. F. Metcalf)

it would probably necessitate a lower price. I don't think there is any question about that. How much, I don't know. I tried to find that out, but people are evasive on that; I don't know.

Q. It will be less?

A. It might be that a proper deal could be worked out with Procter & Gamble, wherein they would permit certain things. That is a new idea to me. I just got that this morning from Mr. Bergen.

Q. Let me direct your attention to that. You heard the thought expressed there by Mr. Kline that there are negotiations under way between himself and his client and Procter & Gamble? A. That is correct.

Q. Do you believe that would be advantageous to the estate? A. Yes, I do. [14]

Q. Because you so believe, do you recommend to the Court that the two weeks requested continuance of this matter be granted?

A. The Court has been very nice to me, and I am very loath to ask any further favors. I do believe this: if that added time were given, it would enable us perhaps to make a dignified exit on the whole thing. Whether two weeks is sufficient or not, I don't know. I don't know, Mr. Counsel; I don't know.

I am getting a little frightened about the way time passes in these things. We are doing everything the hard way and it takes time, plenty of time; plenty.

How rapidly Washington would act on this, I don't know. He says a week.

The Court: Who can tell?

The Witness: No one can tell. If we got action out of them in a week, it would be very fine.

(Testimony of H. F. Metcalf)

The Court: I have heard that so often, I am convinced that is somewhat ambiguous. That statement to me is ambiguous.

They have not the time, they are busy. They have other matters.

The Witness: I talked to the Federal attorney.

Mr. McCraney: I have a suggestion, Your Honor. Fundamentally, we are not really thinking this morning in terms of other deals. We are talking in terms of the question of [15] whether Your Honor should reverse the finding of the Referee or should uphold it. At the time we last discussed this, I spoke on behalf of the Procter & Gamble and said we were interested in the surface rights to this property. We were not primarily interested in the oil rights, except insofar as we wanted to protect our surface use by avoiding the chance someone would come in and start drilling wells in the middle of the section of the usable property.

It seems to me one logical solution is for Your Honor to consider the question of confirmation this morning and leave open the possibility of our working out some equitable deal by which the bankrupt estate could be benefited by receiving some substantial part of the oil rights.

As Your Honor says, it will otherwise go on and on. I believe we are in a position to work out some kind of a deal that might benefit the trustee. That is the same position we took the last time.

Now, on what terms, we would have to leave the matter open. I don't quite know that. That would be one way to dispose of it today and still benefit the trustee and the bankrupt estate.

(Testimony of H. F. Metcalf)

I don't think there is any substantial evidence produced at this hearing or the other one that the price is so grossly inadequate Your Honor is required to set aside what is confirmed. [16]

The Court: What is left for the undisputed creditors, if the Court confirms—

Mr. Lynch: There is substantial estate left, Your Honor. What the value of that estate is, I am not prepared to say, and I don't think the trustee is.

Of course, this reserves to us all of the rights under the present Universal-Consolidated Oil Company lease. In addition to the oil income, we will have the surface rights of the entire amount of the three-acre parcel on Channel No. 3. Then we have considerable property in the Verdugo-Woodlands area and some scattered lots. What the total value of the remaining property is, after this sale, I am not prepared to say. Are you, Mr. Metcalf?

The Witness: I could make an accurate guess at it. I am pretty familiar with it, after 11 years.

Mr. McCraney: What is your opinion of the value of the remaining property, including the oil rights under the lease?

The Witness: Between \$600,000.00 and \$700,000.00.

This estate all depends on whether we go out and liquidate perforce under the hammer for what we can get or whether we can hold it for a dignified time and sell it to the right people. We have had instances of both in this estate, of throwing away property that should have been held a year and a half longer, or in some cases we have gotten a pretty fair price for our stuff. [17]

The Court: Do you really feel at this time this bid of \$198,000.00 is inadequate?

(Testimony of H. F. Metcalf)

The Witness: No, I don't. I think, if that bid were properly safeguarded—and these gentlemen have shown pretty active feeling in that regard—I think if the oil—and I don't see why, if Procter & Gamble mean what they say—and I feel sure they do—that some proposition couldn't be worked out with them to protect the extra oil rights, whatever they might be, in the future. I don't know. I can't look 15 years ahead.

The Court: I think I was told last time that oil was going up 5 cents a barrel, since last December. I think that was the testimony.

The Witness: Definitely.

The Court: It is going up?

The Witness: It is likely to go up again.

The Court: Why slough it off under a bid like this?

Mr. Lynch: Our income month before last was a little over \$6,000.00; last month something over \$5,000.00. Yet actually the production has gone down.

The Witness: Our income has gone up, because of the increase in price.

The Court: Are you gentlemen through?

Mr. Cahill: I have no further questions.

Mr. Kline: I am still an outsider in the proceeding. [18] With respect to the suggestion made by counsel for Procter & Gamble, if any portion of this matter is left open for decision later, it would seem to me it would be a conditional approval and would have little weight, because they would be able to withdraw—

The Court: You are representing whom?

Mr. Kline: I am representing a prospective purchaser here in court, and would like to acquire the mineral rights.

(Testimony of H. F. Metcalf)

The Court: Who is the counsel representing the creditors that objected to this confirmation of the sale?

Mr. Lynch: That was Mr. Cahill.

Mr. Kline: The only point we have to make is, if there is going to be a continuance, from our standpoint, as a prospective purchaser, the entire matter should be put over, rather than a confirmation made conditionally.

The Court: Yes. So far as this testimony is concerned, if the Court confirms this sale that the Referee offered, of \$198,000.00, after you deduct the items I have here, before the creditors get a look-in, the secured creditors would be left out on a limb.

There is a chance, as the trustee says here, if further time is given, maybe they can get more, but they do not know. It is like everything else.

The Witness: Secured creditors, Your Honor, can't lose.

The Court: You are here asking me now to pass upon the [19] primary question on this review, of whether or not this order of the Referee confirming this sale of \$198,000.00 should be affirmed or reversed. I took the testimony here. The trustee came before us. He thought he could secure a better bid if he was given further time. I granted that time.

Now we are confronted with the same uncertain atmosphere. It is not the trustee's function. He has done all he could to try to get all he could out of this, on this testimony, for the creditors. They are the ones that are interested in this estate, whether they are secured or unsecured.

(Testimony of H. F. Metcalf)

It is the Court's duty to try to see that they get something, if possible. I am satisfied, gentlemen, this bid of \$198,000.00 is inadequate. If I consider any interest of the creditors or the value of the property that has been described here to me, for me to keep continuing and trying to get bids, I do not think I should do it, particularly after we tried it once.

I think the only thing I can do, under this showing here, is to decline to confirm this bid, under the order of the sale of the Referee, and reverse it.

You can go down there and do your business. You will not be here in the court on any of it. If certain things happen, go down there and see if you can do some business; try it. That is the law. That is the procedure if we are ever going to get rid of it. Bring the matter to a head. We are [20] confronted here with the fact that if certain things happen in Washington maybe this would happen or that would happen. The uncertainty is the thing that bothers any judge in passing upon the rights of people.

You confront us with a cold proposition. Primarily, should this order of the Referee confirming this sale be confirmed or sent back under this petition for review? That is what you have before me. I am satisfied the trustee has done all he could and is trying to do all he can to get all he can out of this property for these creditors, these unsecured creditors.

If I confirm this sale here today of \$198,000.00 and deduct certain items, of course you will not have anything to speak of for the unsecured creditors. I do not think

(Testimony of H. F. Metcalf)

there is one secured creditor here who says he is waiving anything.

There was some bank that argued to me, that was interested, they had gotten their principal, and they were willing to waive their interest if I would confirm the sale. That is the thought you put up to me six weeks ago or five weeks ago. The bank could afford to do that because they have gotten their money back.

The Witness Plus 1½ per cent interest; 1½ per cent interest.

The Court: The surface rights and oil rights of the other property makes it very uncertain and doubtful what is [21] going to be left for any creditor. On this showing before me I would not be justified in confirming this sale at all. I would not be justified in continuing here, trying to administer the sales of certain parts of this estate, in hopes we might get another bid if certain things happen. The "if" is always in the way.

That is your thought you were putting up to me this morning again, the same as you did five or six weeks ago; about five weeks ago. I am satisfied, in the interest of all concerned, I should not confirm this order of sale of the Referee for \$198,000.00.

I have given you all a chance to see if you could do better, and we find you cannot. We are just where we were. I have to pass on it.

The order will be, the sale of the Referee is not confirmed. It is reversed.

Gentlemen, you will have to go there to transact your future business.

(Testimony of H. F. Metcalf)

The Witness: Thank you, Your Honor.

The Court: You are excused.

(Witness excused.)

The Court: I have helped you all I can. I feel I can't do anything else. If I continue this hearing and keep continuing it, another judge would have to go all over it and take the testimony I have taken, again. [22]

Go down below again and see what you can do with the Referee, if you want to. If you cannot conscientiously do it under this record, perhaps some other judge could.

The trustee, at the time the Referee made the order, if I remember, thought that was the best bid they could get. Since then he has believed he might get a better bid. Why not go there and administer it, and see if you can do it?

Mr. Metcalf: I will be glad to do it.

The Court: I cannot help you any more on the petition before me. Under the evidence, I am satisfied the objection should be sustained of the petition of the creditors here.

Mr. Metcalf: Your Honor, may I make a prediction? All the creditors will be paid in full in this estate.

The Court: Let us send it back and try it over again, and see if you can get another bid.

Mr. Metcalf: Fine.

The Court: I think that is better than to keep continuing it here, waiting for certain things to happen.

Mr. Metcalf: I still think we might work out a deal with Procter & Gamble; I think we might.

The Court: You tried it for the last five weeks.

Mr. Metcalf: No, I haven't been near them in the last five weeks. I have been trying to sell the estate or borrow money to liquidate the creditors or sell a portion of the estate. [23]

The Court: This question before me of confirming this particular sale, you were given time to see what you could do with that. That was all there was before me. I have nothing to do with the rest of the estate. In other words, if I did go into all those matters, I would be acting as a referee for the entire estate, instead of the property before me.

I will send this back to the Referee, and it is up to you and him whether you take two weeks or two years. That is your business, unless somebody else wants to try to get it reviewed again in some court. I feel I have done all I can on this petition, to review for the order of sale by the Referee. I don't feel that bid of \$198,000.00 is adequate.

I will have to reverse this order of the Referee.

Mr. Lynch: I assume you will draw the necessary order, Mr. Cahill?

Mr. Cahill: Yes.

The Court: You still have your chance—

Mr. Cahill: Yes.

The Court: The question is what tribunal you should go before to do it. I feel I have done all I can under this.

[Endorsed]: Filed June 10, 1948. Edmund L. Smith, Clerk. [24]

[Title of District Court and Cause]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, March 11, 1948

Honorable Charles C. Cavanah, Judge Presiding

* * * * * * * *

Los Angeles, California, Thursday, March 11, 1948

10:00 A. M.

The Court: You may call the case, Mr. Clerk.

The Clerk: In the Matter of F. P. Newport Corporation, Limited, a corporation, No. 25308-M.

Mr. Cahill: We are ready.

Mr. Nelson: We are ready.

Mr. Lynch: The trustee is ready.

Mr. McCraney: We are ready, your Honor.

The Court: You may proceed.

Mr. Lynch: If the court please, this matter is brought on by way of a motion made on behalf of the Trustee in Bankruptcy to affirm the order of the Referee and approving and confirming the sale of certain property to the Procter Gamble Company.

Actually, however, the burden of establishing any error on the part of the Referee is upon the reviewing parties and the motion was a mere formality in order to get the matter heard.

The Court: Do you represent the reviewing party?

Mr. Lynch: No. I represent the Trustee in Bankruptcy and in order to get it on the calendar I made a motion to affirm the order of the Referee.

The Court: Very well.

Mr. Cahill: May it please the court, I am Lawrence M. [4] Cahill. I am attorney for the Bankrupt in this matter and have been since lo these many 11 or 12 years during which this proceeding has been pending.

I am also attorney for certain unsecured creditors who joined with the Bankrupt and filed objections to the proposed sale and who, with the Bankrupt, had petitioned this court for a review of the order of the Referee confirming the sale.

I state to your Honor that at the time of the hearing before the Referee an unsecured creditor, the Bank of America, appeared by its counsel, Mr. Edmund Nelson, and moved to join in the written objections filed by myself on behalf of the bankrupt and the creditors whom I represent.

That motion was granted. Also at that time creditors, unsecured creditors represented by attorneys other than myself, filed other written objections. Those other creditors, a relatively small group as I recall, have not petitioned for a review. The creditors represented by myself having claims aggregating \$80,419.46, have petitioned for a review with the bankrupt.

At this time the Bank of America appears through its counsel and offers to aid the bankrupt and the creditors represented by myself in the prosecution of this petition for a review; and at this time I move your Honor that Mr. Edmund Nelson be associated as counsel with myself in this proceeding [5]

The Court: He may do so.

Mr. Cahill: I will state to your Honor that since this matter was heard before the Referee for over quite a number of days in November—I think it started in November or December of last year, there has been, I

am informed. a very important development discovered by the trustee in bankruptcy in reference to this particular property.

I am informed that the trustee appears at this time voluntarily with the hope and the desire that he will be permitted to be sworn and testify in his capacity as trustee that he has discovered facts since the hearing before the Referee, that are of such a serious nature, in reference to the property of the estate, that he believes that that information should be before the court at this time.

I will state to your Honor that I have intended to call Mr. Metcalf to testify as to one fact discovered subsequent to the hearing and that was this. One of the conditions of this sale was that there might be a loss or a detriment to the estate as to the remaining recoverable oil values. When the matter closed and experts had testified that it was generally conceded that there were apparently large recoverable values the dollar and cent factor was not determined. We had no particular way to do it. But I have heard since that the trustee subsequently went abroad on the land and approached royalty buyers and he said: [6]

“If the surface rights are sold and we have our royalty left what will you pay for it?”

He made a discovery of two things. One I intended to call him on. The other I understand he wants to acquaint the the court with the facts himself.

The one that I wanted to call him on was that he discovered in hundreds of thousands of dollars just what that recoverable value apparently was—what royalty buyers were willing to offer, and from my viewpoint it was a factor so high in dollars and cents that I thought

if known to the court the very weight and amount of it would be a matter of serious concern to the court when it considered what is the fundamental question here on review.

There are several important questions but the fundamental question whether the condition of this sale imposed by the buyer that the mineral rights passed with the land and we retained only our interest under the present lease.

That condition was so detrimental, so dangerous to the estate that the sale should not be confirmed—certainly not with that condition and I thought that if the court knew in dollars and cents the apparent tremendous figure of what royalty buyers think are the recoverable values the court would give that question that I have just stated a very, very deep consideration.

So at this time, if your Honor please, I move that [7] we be allowed to call—I understand the trustee's counsel has no objection—Mr. Metcalf as trustee to testify as to these matters discovered since this hearing.

The Court: You say there is no objection?

Mr. Lynch: If the court please, I think I should make clear the position of the trustee in this matter.

This bankruptcy proceeding has been pending since 1935. For a number of years the trustee has been actively endeavoring to sell this property among other properties. At the time of the submission of the offer by Procter & Gamble to purchase the property and at the time the trustee recommended the approval of that offer, it was the opinion of the trustee that that was the best offer that he would be able to obtain and certainly was the best offer for the property that he had been able to obtain up to that time.

Since the order confirming the sale was made the trustee informs me that certain people have come to him and suggested that they might be willing to pay considerably more for the property than was paid—than was offered by Procter & Gamble Company, including both the oil rights and the surface rights or the fee to the property.

Those tentative figures and discussion of figures ran up into several hundred thousand dollars more than this offer amounts to.

Now, the trustee in reality is the trustee. It is [8] not his purpose nor desire to force upon this estate a sale which is not in the best interests of the estate and the creditors. The order was made by the Referee at the time when certainly no better offer at that time was available. So, so far as the trustee is concerned we have no objection to the court taking such evidence as it may deem proper so that it can thoroughly understand what the situation is and whether the court is disposed to listen to evidence concerning matters that have arisen since the confirmation of the sale I am not prepared to say.

The Court: I think under the statement of counsel here, both of you, it would be the duty of the court to take evidence under the conditions that have arisen since that sale was confirmed by the Referee. It is a matter, as you state here, that may be of interest to all concerned, creditors as well as the bankrupt.

You say a condition has arisen where probably more money can be obtained on a sale of this property by reason of subsequent developments since the order of the Referee. If that is the case why shouldn't the court give you that opportunity rather than just arbitrarily say, "I will consider it only on the record that was before the Referee," and rule one way or the other?

This is an unusual situation for this kind of proceeding for this circumstance to develop, so it seems to [9] me there is no contest and I think it is my duty to hear any evidence that you may offer.

After all, the law contemplates that the property of the bankrupt shall be justly administered and all obtained out of it that is possible in order to pay the creditors and if there is any surplus to help the bankrupt. That is the primary purpose of the bankruptcy law and why shouldn't we be a little patient and see if we can obtain more for the sale of this property. You may proceed.

Mr. Cahill: Mr. Metcalf, will you come forward?

H. F. METCALF,

called as a witness by and on behalf of Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: H. F. Metcalf.

Direct Examination

By Mr. Cahill:

Q. Mr. Metcalf, you are the trustee in bankruptcy in this matter? A. Yes, sir.

Q. And have been since, if I recall, the year 1937?

A. I think that is correct; yes, sir.

Q. And your business is that of a realtor?

A. Realtor.

Q. You are, I believe, one of the oldest established [10] real estate firms in Los Angeles?

A. I believe that is correct.

(Testimony of H. F. Metcalf)

Q. You have specialized for many, many years as a realtor in downtown and business real estate?

A. Yes, sir.

Q. As well as general real estate?

A. General real estate.

Q. You have been a trustee or receiver in this court on many, many occasions, have you not?

A. Yes, a great many.

Q. And on largely—primarily very, very large estates?

A. Most of them were very large.

Q. You are familiar, Mr. Metcalf, with the lands belonging to this estate that are located on Channel No. 3?

A. Yes, sir.

Q. And they are composed, are they not, of two parcels, one of six acres and one of three acres?

A. Yes, sir.

Q. And those two parcels are separated by a three-acre parcel owned by other persons?

A. That is correct.

Q. On the six-acre parcel as well as the three-acre parcel there are oil wells that are producing oil?

A. Yes, sir. [11]

Q. And they have since, oh, approximately 1938 or 1939—somewhere in there?

A. 1938, I think. They have produced over three million dollars worth of oil, your Honor.

The Court: Since 1938?

The Witness: Since 1938, yes, sir, from the nine acres, a gross amount to all parties.

Q. By Mr. Cahill: That three million dollars was gross, was it not?

A. Yes, gross to all parties. Our portion of that, your Honor, was 35 per cent, plus a bonus.

(Testimony of H. F. Metcalf)

Q. Mr. Metcalf, you have an auditor employed by yourself as trustee in this matter? A. Yes, sir.

Q. Mr. J. B. Gribble? A. Yes, sir.

Q. I assume that you do not carry around in your head and know exactly of your own knowledge the net royalty received by the trustee during those years?

A. Yes, I have. I have it in my pocket, Mr. Cahill. I have a summary on one page of the entire operation of this receivership and trusteeship for my full term, stating the amount of secured creditors at the beginning of the term and the amount we now owe the secured creditors. It is rather interesting, your Honor. I am not ashamed of it. [12]

Q. Mr. Metcalf, possibly all I can expect to do at this time is place before the court in this matter just an idea of what we have already received. I will state to you that in the sworn objections as filed in this matter, I set forth on Page 5 thereof an item which I obtained from Mr. Gribble as being the royalty which you have received and banked, and it was stated as \$1,231,901.87 as of on or about the 12th of November, 1947. That is approximately correct, is it not?

A. I think undoubtedly that is correct, although my summary here does not show that. I asked to have a summary made, your Honor, showing the amount of indebtedness which I took over and the amount now due and the amount of recovery we have made from the sale of property.

There has been some question whether I was active enough in the sale of property. I wanted that set forth here. We have paid the secured creditors from \$1,304,000 down to \$322,000, and against that \$322,000 there are

(Testimony of H. F. Metcalf)

creditors of 8 and 2 and some other amounts making a net owing to the secured creditors as of today of about \$300,000 in lieu of \$1,304,000—that was when we went in.

Q. Mr. Metcalf, I also stated in there and obtained the figures from your auditor, that as to this six-acre parcel of land which is involved this morning before this court, that of the total gross recovery made from that six-acre [13] parcel of \$1,341,363.04, that your share actually received and banked by you from the six-acre parcel was \$469,477.06. I that correct?

A. If Mr. Gribble said so it is undoubtedly correct. He is an excellent auditor.

Q. Now, Mr. Metcalf, at the hearing before the Referee on or about the 12th day of November, 1947—well, let me state starting on the 13th day of November and being continued to the 24th and 26th of November, and the 1st of December, all in 1947, you appeared at that time, did you not, and gave certain testimony?

A. Yes, sir.

Q. In reference to this proposed sale to Procter & Gamble?

A. Yes, sir.

Q. And you had previously in the petitions which have been filed seeking an order to confirm the sale, recommended to the court the sale be made, did you not?

A. I did.

Q. Mr. Metcalf, will you state to the court whether subsequent to December 1st, 1947, that day being the last day of the hearing in this matter, any information or knowledge was received by you in reference to this sale and in reference to this property which now leads you

(Testimony of H. F. Metcalf)

to believe that you were mistaken in so recommending the sale to this [14] court?

A. That is correct.

Q. And will you state what those facts are?

A. If the court will permit me a few words, we had a piece, for instance, out in the middle of the San Fernando Valley. I tried desperately hard to sell it. I advertised it. My best offer was \$65,000 which I knew was very low. It was sold over my objection.

All at once the market in the San Fernando Valley went sky high and I am led to believe that the owners of that property have been offered a quarter of a million dollars or \$300,000 for that property.

Now, I have tried, not very seriously, but I have tried rather definitely to sell the oil rights down here. There has been very little demand for them. All at once out of a clear sky oil goes up and oil royalties are being sought very much—sought after, oh, very much.

Now, I have been under rather heavy compulsion, your Honor, to clean this affair up. Judge McCormick wants it sold. He told me so very frankly. At least he wants the thing cleaned up at the earliest possible moment.

His Honor, Judge Dickson, has been even more insistent that it be closed. When this offer came from Procter & Gamble it wasn't a bad offer. It sounded pretty good. We had testimony—maybe it was a little too cheap but not to me in my opinion. [15]

I am only stating my opinion now based on the evidence, both of my own knowledge and the evidence that was adduced at the trial. The price was pretty reasonable, reasonably fair. They were nice people to deal with. It was all cash. My only offset was I had to

(Testimony of H. F. Metcalf)

clear off a space on the corner of the tract and prepare it for them for a certain purpose. That was estimated to cost approximately \$20,000.

We had a commission to pay which was perfectly all right, and we had payments to make to the Federal Government of about \$20,000, which was pretty well set.

That would give to the secured creditors a payment of about \$155,000 or \$150,000.

Now, your Honor, I am very anxious to close this estate out. I have been under pressure to do it and I want to do it but I do want to do it in the proper way.

Now, since that came up it has delayed the matter several months and I have had a number of people, one of them tentatively offered me a half million dollars for the oil on the nine acres. Another offered tentatively \$600,000 for the oil in the ground on the nine acres.

I told them that if I could make any composition with the Federal Government, any composition as to taxes, that I would recommend to the court a sale at \$750,000 which, after paying any reasonable taxes and commissions and so forth, [16] would liquidate this estate; would pay the secured creditors, would pay the second creditors in full and pay such fees as have heretofore been allocated to the estate by the court.

Now, of course, I don't know—first, I haven't a definite offer but I am led to believe I am dealing with people, one of whom is in the court this morning, and would be very glad to testify if you wish to hear from him. He is a broker. He has been working very hard on it and claims to be in a position to sell it.

Now, your Honor, I don't know this morning whether we could get some assistance from the Federal Govern-

(Testimony of H. F. Metcalf)

ment. As the matter stands today it would cost us 42 per cent to sell on the profit the capital gain which the estate can't take. It will just murder us. It would cut the heart out of it. It would cut the heart out of the estate and make it impossible to sell.

On the other hand, attorneys of standing here in the court have advised me and also the purchasers, the proposed purchasers have told me definitely that the Government is amenable to various other ways to liquidate a bankrupt estate that might relieve us from, not all of the taxes perhaps, but a confiscatory tax as it will be in this case.

Now, your Honor, I am in a peculiar position. I am under compulsion by his Honor to clean this up. I want to do it quickly. I want to comply with the orders. But I [17] think the quickest way to do it and the only way that I can see at this moment would be to sell the nine acres and the oil, both of which are very, very valuable—very valuable.

The water frontage is valuable in itself. It is very choice. It is on a good channel in a good place and it is a splendid piece of property.

Q. Might I direct your attention to this situation? Is it true that now for the first time there are apparently responsible buyers available for both the land and the oil in one sale? A. That is true.

Q. And does the factors that are apparently available as price-making, are they very, very much higher than anything that could have been anticipated heretofore?

A. That is correct, very definitely, very definitely so—very definitely.

(Testimony of H. F. Metcalf)

Q. Is that in your opinion or from what the proposed buyers tell you traceable in part to the fact that there have been very numerous increases recently in the price of oil?

A. Yes, sir; that is true, and there are, perhaps, other increases scheduled.

Q. Mr. Metcalf, at the time of the hearing before the Referee in this matter a statement was prepared by my office, really by Mr. Gribble, setting forth the monthly production by years of oil in barrels and price, and at the bottom he [18] made a memorandum as to the price increases that had been received by you, which disclosed that on April 1st, 1946, there was an increase of ten cents per barrel. On August 1st, 1946, an increase—he has marked it here “13 cents to 27 cents” per barrel. It varied at that time, as I remember, by the gravity. And on March 19th, 1947, an increase of 22 to 25 cents per barrel. And on July 1st, 1947, an increase of 20 cents per barrel.

Do you know of your own knowledge that those increases were received at those times?

A. Yes. I know that they were received. I can't confirm the dates. I don't know those.

Q. Now, this question, Mr. Metcalf. Is it true that there has been another substantial increase in oil, the price of oil per barrel since December 1st, 1947?

A. That is correct, I believe, yes, sir.

Q. All right. Now, Mr. Metcalf, this question. In approaching royalty buyers subsequent to, or your conferences with their representatives subsequent to December 1st, 1947, did you make any discovery in reference to the price that they would be willing to pay for the oil

(Testimony of H. F. Metcalf)

itself as distinguished from the land on the theory that this sale would be confirmed and you no longer owned the minerals in place but only had an overriding royalty interest under the present lease? Would you answer that question yes or not, Mr. [19] Metcalf?

The Witness: What was the question? Did I know what?

Mr. Cahill: I will ask the reporter to read the question.
(Question read.)

Mr. Lynch: I object to the form of the question because it assumes that this is an overriding royalty. Actually what the trustee has left is not an overriding royalty. It is a landowner's royalty.

Mr. Cahill: I will strike the word "overriding."

The Witness: Yes, yes, I understood—yes, I made—

Q. By Mr. Cahill: Will you state to the court then what discovery you made?

A. Well, I made the discovery that those purchasers who wished to buy oil royalties do not want any interference with the nature of the royalty. In other words, they want any production that may accrue after the term of this lease. Now, the lease that we have on the land that was proposed to sell to Procter & Gamble, expires in 15 years. The general opinion among experts is that it is a long lived field. There are three different oil strata and probably one or two more that have not yet been explored and they did not want a termination of the lease in 15 years. And further, your Honor, I was agitated by the idea that if we sold this to Procter & Gamble someone might make a composition—Procter & Gamble could make a composition with the oil drillers and [20] cancel the leases, cancel me out, which would be murder.

(Testimony of H. F. Metcalf)

Now, in fairness to Mr. Bergen who represents Proctor & Gamble here, he has told me they will waive—that they will definitely waive their rights to purchase that lease prior to its termination unless the lease is cancelled by the driller because of non-production. That still leaves a rather heavy objection.

Q. And that is, Mr. Metcalf, that Proctor & Gamble cannot control the Universal Consolidated Oil Company, the present lessee, if they should elect to abandon the lease?

A. That is correct. Of they could sell, I presume, to somebody else.

Q. Or quitclaim the lease?

A. Yes, quitclaim the lease.

Q. Now, Mr. Metcalf—

Mr. Iverson: Mr. McCraney, representing Proctor & Gamble, and I are willing to make any reasonable stipulation or agreement that will meet the objections that have been raised by Mr. Metcalf—in other words, we have no intention of going around behind the trustee's back and buying up the interests of the Universal Consolidated Oil Company, and we are willing to agree to anything that will assure the court and trustee that we will not do that.

If the sale were confirmed we would assume that when the Universal Company is through that they would quitclaim to [21] us, but we have no intention of soliciting any release of their interest and we will agree that we will not do so. Is that sufficiently clear?

The Witness: That disposes of one very important objection that I had to the Proctor & Gamble sale. That disposes of one objection but not the other.

(Testimony of H. F. Metcalf)

Q. By Mr. Cahill: The other, of course, Mr. Metcalf, is beyond the control of anybody except the lessee, Universal-Consolidated Oil Company?

A. Well, the Consolidated Oil Company told me they could sell their lease—they would cancel their lease on one of their wells and named a price and I had a bidder the other day who told me they would overbid the Proctor & Gamble bid here.

I asked them what their procedure was and they said they would proceed to cancel out the oil leases promptly and clean them up.

Q. Mr. Metcalf, as trustee in this matter, you feel at this time, or do you feel at this time that the best interests of the estate and all the parties would be served by this sale not being confirmed but rather that the oil property land and oil being sold as one unit?

A. That is correct.

Q. And apparently you find now that for the first time there are buyers on that basis? [22]

A. That is correct.

Q. And you find that the price that they are suggesting is a very, very much higher price over anything that has been conceived of or received heretofore?

A. That is correct.

Q. Under those circumstances, Mr. Metcalf, are you prepared to inform this court at this time whether, having the knowledge that you have now with reference to these matters, assuming that you had had that knowledge last November and December, would you have recommended this sale? A. No, I would not.

Q. The answer was what, Mr. Metcalf?

A. No, I would not.

(Testimony of H. F. Metcalf)

Q. And do you at this time care to make any recommendation to the court as to whether this sale should be confirmed or not?

A. Well, your Honor, I think in view of all the facts, both such as I have obtained from Judge McCormick and also Judge Dickson as to the haste in closing this matter out, that the interests of the estate would be best served by giving me a further opportunity to liquidate the entire thing and at one swoop, and I think I can do it and do it within a reasonable time. I think I can. We have, as stated here, we have liquidated the secured creditors down to \$300,000. Those figures are substantially correct. From \$1,300,000. [23]

Now, we have unsecured creditors in an amount of approximately \$200,000 and fees have been allocated somewhere between 75 and 100 thousand dollars.

That is the burden that is facing this estate to pay off. That can be done, your Honor. It can be done.

The Court: Under these subsequent offers to you?

The Witness: It can be done.

The Court: Or do you want a further opportunity to negotiate with other people other than the offers that have now been made since the sale?

The Witness: If you please, your Honor, I would like very much to have an opportunity to close a deal for the entire holding and pay off everybody 100 cents on the dollar. I think that can be done.

The Court: You have had representations made that that can be done from people who might purchase the property?

The Witness: That is correct, sir, people who have the money and whom I know to be competent and good.

(Testimony of H. F. Metcalf)

That doesn't mean, your Honor, I can absolutely do it but I wouldn't sit here and say this if I didn't think that I could. And I have been in this real estate business 40 or 50 years.

The Court: Are the people who have been recommended to you the ones who want to purchase the property?

The Witness: That is correct.

The Court: They want to purchase the property? [24]

The Witness: They want to purchase the nine acres and the oil without interference of any kind.

The Court: And their offer, you think, is a substantial increase over what this sale has been confirmed at?

The Witness: I don't object to this particular sale so much except it doesn't give me a chance to clean up and I want to clean up. Judge Dickson was very emphatic the other day. He gets that way and I felt—

The Court: I am not acquainted with Judge Dickson.

The Witness: He is the Federal Referee in Bankruptcy. That is the correct title.

Q. By Mr. Cahill: Let me call your attention to this. You have answered the court's question but the answer was negative but responsive. The court's question was, as I recall it, whether the offers now are substantially over—represent substantial increases?

A. Well, I haven't definite offers, Mr. Cahill. If I had one I would talk entirely differently. I haven't definite offers. I have had casual offers, your Honor. I have had men who say we can get \$600,000. "Do you want to look at it?" And I said, "No, I can't wiggle out at \$600,000. Will you pay \$750,000?" They said, "We think we can get it—we think so."

(Testimony of H. F. Metcalf)

The Court: How much time do they want to think it over?

The Witness: God knows, your Honor. [25]

The Court: That is the trouble.

The Witness: Not too long. I don't want a long time. I don't ask for a long time.

Q. By Mr. Cahill: Mr. Metcalf, are either of those last figures that you named, \$600,000 or \$750,000—is the \$600,000 that they suggest available and is the \$750,000 offer available? Are either one of those figures a substantial increase over the price offered here of \$198,000?

A. Well, to an extent, yes. Yes, they are. Here is what I am afraid of, your Honor. If I sell this land to Procter & Gamble it is going to interfere with my further sale and if it does, why, it will just take that much longer to get out. It might take considerably longer. I am interested now in protecting the unsecured creditors. The secured creditors are amply protected. This estate today is worth well over three quarters of a million dollars. Well over that, and their balance here is approximately \$300,000. I don't think they are distressed about it now at all. I don't know. They are here and they can state so if they are.

But the second creditors, it seems to me, they deserve some protection, and the charges against this estate I want to get money enough to liquidate—liquidate the entire thing and I want to do it as promptly as possible. I don't want to have this thing prolonged a year or two more. [26]

You know, your Honor, it is difficult to sell quickly in this kind of property. It is awfully difficult. You

(Testimony of H. F. Metcalf)

have to take— Now, there is a very hot market for oil royalties—very hot, something I haven't seen here in 12 years—nothing remotely like it and oil royalties are beginning to be very much sought for and people of large wealth are looking at them and figuring them very seriously.

Q. By Mr. Cahill: Have you discovered, Mr. Metcalf, since December 1st, 1947, that those buyers are reluctant to deal with you in reference to the royalties here because of this impending sale with the conditions attached?

A. Well, I have been told that that will be a serious detriment. Now, how much it would reflect itself in price, Mr. Cahill, or whether it would destroy the deal or not, definitely I don't know that. I have been told that it would definitely destroy one or two sales—that they would not buy a royalty that expired and that had the possibility of cancellation of some kind.

Mr. Cahill: I have no further questions. I don't know whether Mr. Nelson has or not.

Mr. Nelson: I would like to ask Mr. Metcalf one or two questions.

The Court: You may do so. [27]

By Mr. Nelson:

Q. One of the conditions of this sale to Proctor & Gamble is this, and you will correct me if I don't state it correctly, that certain installation, mechanical installations and storage tanks on the six-acre parcel which was sold, must be moved at the expense of the bankrupt estate?

A. That is correct.

(Testimony of H. F. Metcalf)

Q. To the other parcel, which is three acres, so as to concentrate on the three acres the principal storage facilities and other installations of the oil well operators.

Will the concentration and location on that three acres of all those installations operate, in your opinion, as a detriment to its use in the future—that is, to its use of the surface of that area in the future?

A. Very definitely. Mr. Starr, the president of the Universal-Consolidated, said if we move these tanks and this other installation to the three acres it will preclude the use of any part of the surface of it.

Q. It was a condition, was it not, of the lease that was made in 1937 to the Universal-Consolidated Oil Company, that the bankrupt estate reserved and should have the right to use the surface of the two leased areas to the extent that such use was feasible without interfering with the operation of the wells?

A. No. We made definite restrictions that we would [28] retain a depth of 150 feet from the water line back that they could not infringe on. We felt that might be of use on the six acres. We kept a street, at some points 27 feet wide, as access to the water frontage. I don't know that any—I don't think a restriction was made on the three acres. It was too narrow. But on the six acres we restricted that.

Now, I may say that the oil people have been very co-operative and very anxious to help us in every way possible.

Q. Well, the installations on the six-acre parcel at the present time—that is the oil operators' installations, do not interfere with its surface use?

A. Oh, yes, they interfere very definitely.

(Testimony of H. F. Metcalf)

Q. I mean, they do not preclude its use?

A. They don't preclude its use—they don't preclude the use of the water frontage.

Q. They do not?

A. No, we have 150 feet of depth there that we can use at any time and which they have no wells or no installations of any kind on it, and we have access to that.

Q. But if the principal installations are moved to the three-acre parcel will that parcel thereafter be salable in your opinion?

A. There will be no surface rights salable, I think, [29] at all.

Q. Because they will be burdened then for the life of the lease?

A. That is right, they will be burdened for 15 years.

Mr. Nelson: I apprehend some of this, your Honor, may be confusing to the court because you cannot, in the nature of things, be entirely familiar with the entire picture. We talk in abbreviated terms assuming that everyone understands what we are talking about because we have been in this case for many years and we all know what the subject is.

Q. The sale at \$198,000 was not net. It required the trustee to pay for the cost of moving these installations, did it not?

A. Had a bid price on that of approximately twenty to twenty-two thousand dollars which we must pay. There was a commission allocated, I think, of \$5,000 and Mr. Gribble advised me that the charge to the Federal Government would be approximately \$20,000, capital gain tax. There would be approximately \$150,000 left which would go to the Security Bank first creditors.

(Testimony of H. F. Metcalf)

The Court: \$198,000?

The Witness: Yes, sir. That would enable us to liquidate our indebtedness—a sale at \$198,000 would enable us to liquidate from \$150,000 to \$155,000 of indebtedness. That is the net amount and value of this sale. [30]

Mr. Nelson: With reference to the interest of the United States I think your Honor should be informed that by reason of the fact that the trustee, oil having been found on the leased land, received revenue from the operation of the oil wells. It was ruled in a case that went up to the Circuit Court of Appeals that the trustee was operating a business and that therefore the income of the bankrupt corporation was taxable like any other corporation. If it had been a straight liquidating proceeding and there had been no operating of any business, of course, the proceeds of the sale and so forth would not have been taxable. So, we have a tax problem running along with these sales.

The Court: Who can interfere with the tax problem?

Mr. Nelson: No one. No one at all. Nothing but changed conditions. We have that to face.

The Court: If there is \$150,000 left to pay the bank what would be the balance of the bank's claim?

Mr. Nelson: Approximately \$150,000, your Honor.

The Court: More?

Mr. Nelson: More.

The Witness: That has been paid down from \$1,305,000.

The Court: It will leave about \$150,000 more due the bank if this sale is confirmed?

The Witness: That is right, that is correct.

(Testimony of H. F. Metcalf)

Mr. Nelson: Then, your Honor, there are approximately [31] \$200,000 of unsecured claims.

The Court: Unsecured creditors?

Mr. Nelson: And expense of administration which has been accruing for many years and they are quite large.

Q. By Mr. Nelson: Mr. Metcalf, a reservation or condition of that sale is that the bankrupt estate reserves the royalty interest—that is, its original landowner's royalty interest under the lease? A. Yes, sir.

Q. So it would receive the royalties under the lease? A. So long as the wells are properly operated.

Q. So long as the wells are operated by the Universal-Consolidated Oil Company? A. That is right.

Q. If the Universal-Consolidated Oil Company at some future date should abandon the wells so they would no longer be producing, the Newport Estate, the bankrupt corporation, would not then have any right to step in and operate for itself on its own account, would it?

A. I think not.

Q. Normally it would except for that condition?

A. That is correct.

Q. And the sale conveys to Proctor & Gamble, if it is confirmed, all of the mineral rights in the property other than the reserved royalties under the lease? [32]

A. Yes, sir.

Q. In other words, it gets the fee title with all the mineral rights?

A. That is correct.

Q. And the bankrupt estate reserves only the royalty?

A. Yes, sir.

(Testimony of H. F. Metcalf)

Q. Is it true—it is true, is it not, that there has been some possibility—at least the possibility has been considered and discussed by engineers at various times that other oil zones may be developed in this property in the future—deeper zones?

The Witness: Your Honor, there are deeper zones there that have been explored in contiguous property profitably. I believe one well was pursued. Now whether they got a profitable well or not we don't know. They say not, so I don't know. But there are two deeper zones, what they call the 237 zone and the Ford zone.

The Harbor District has been very productive. There is the Ranger zone, Upper Terminal zone, and Lower Terminal zone. Now, below that is what is called—I may be incorrect here—I am not a geologist, but below that in some portion of the harbor there is what is called the Ford zone and the 237 zone, and we are very hopeful that the three acres at least, if we retain that, might be explored for these lower zones. If we get profitable wells there this [33] estate is in very fine condition.

Q. By Mr. Nelson: If that should happen, if this sale is confirmed this estate would have no right in any oil subsequently discovered?

A. Subsequent to the expiration of the lease. No.

Q. And do you believe that in a reasonable time, if you have the opportunity, you could obtain a buyer for the land and the oil rights that would go with it?

A. Yes, sir, I do, definitely.

Q. And do you believe in the sale—

A. Counsel, whether or not that sale could be made with the incubus—of the cloud of the Federal taxes on us

(Testimony of H. F. Metcalf)

or not, I don't know that. I don't know, your Honor. We can't pay 42 per cent. That is flat and final. If we sold for \$750,000 and had to pay \$300,000 to the Government, why, we are broke.

Mr. Nelson: I would like to make this comment on that to your Honor. The tax problem is one that we would necessarily have to work out with the Internal Revenue Department and it isn't something that the trustee can determine.

The main point is, there is a valuable property here and it is sufficient, if sold properly, to pay all of the indebtedness of this bankrupt and let it go out of court with its debts paid. It has other residual assets of considerable [34] value but they are not in question at this time.

It seemed to us that the sale was improvident and I objected to it at the time it was up before the Referee for confirmation on the ground that the price offered was not adequate, and on the principal ground that the conditions of the sale left a burden and also restricted it further—that is, so restricted the oil rights as to—royalty rights, as to leave nothing with respect to this six acres in the bankrupt estate except the royalty interest for the life of the lease, whereas there might be—there is a possibility that there are other oil values in that property which should be preserved and would go to the buyer who would pay an adequate price.

Q. The indebtedness of the Security-First National Bank at the time of the adjudication was, after the indebtedness had been adjusted, was about \$1,307,000, was it not?

(Testimony of H. F. Metcalf)

A. Yes. Yes, I think so. I have a complete setup here. The original loan, your Honor, was \$760,000 and the Security Bank advanced it and the interest rolled up and they paid taxes and I have the statement here showing that when I came into this there was practically \$1,304,918 due the bank.

The Court: What is that balance now?

The Witness: Their balance now is \$322,156. Now, against that, your Honor, I have on hand a mortgage of [35] \$8,000 which is perfectly good and \$3,000 is interest which I expect to pay rather promptly and we have a \$15,000 sale in escrow now, so I think it is safe—I think I am quite safe in saying the bank balance is about \$300,000. We paid our interest and taxes promptly.

Mr. Nelson: The record of this case will disclose this, your Honor, and the accounts from the beginning of the bankruptcy, the revenue derived principally from the oil there—there were a few sales but it was derived principally from the oil.

The Witness: Mr. Counsel, there was \$416,000 worth of real estate sales. We have sold \$416,000 of real estate property.

Q. By Mr. Nelson: But over the period of this receivership, which has now run about 11 years—that is, since the adjudication in bankruptcy, and the receivership was originally two years before that, was it not?

A. I believe it was.

Q. The principal indebtedness to the Security Bank has been reduced from over \$1,300,000 to about \$300,000?

A. That is correct.

Q. Net?

A. That is correct.

(Testimony of H. F. Metcalf)

Q. And in addition to that taxes on the property and interest on the indebtedness to the bank has been paid, has [36] been paid, has it not?

A. Paid the Government some very large sums.

Q. And substantial sums have been paid to the Government for taxes?

A. That is right. Paid them \$65,000 in one year. We have paid heavily in taxes.

Q. Mr. Metcalf, do you now recommend that the sale be confirmed or would you recommend that it be confirmed if it were again before the Referee?

A. No, I would not. I would like very much further time to work this out.

Mr. Nelson: I would like to say, to your Honor, aside from the view of the trustee, which I think is honestly changed, and properly so because of conditions which have developed very rapidly, there are basic objections to this sale because it isn't \$198,000. It is a great deal less than that. One of the conditions of the sale creates a burden on another important parcel of property and it practically restricts the use of the other parcel. No one would buy it for any use except to obtain the oil from it for, the next 15 years and when a sale is predicated on a condition like that I think that it is quite proper to inform the court and to ask the court to consider the equities of the situation and the fairness of it and whether or not it is in all respects advantageous or disadvantageous. [37]

If it is disadvantageous, if it carries burdens which will be projected into the future, which may interfere instead of assisting in the long run in the complete liquidation of this estate, then I don't think the sale should be confirmed.

(Testimony of H. F. Metcalf)

Cross Examination

By Mr. Lynch:

Q. Mr. Metcalf, your present views are the result of certain conversations that you have had with brokers concerning the possible sale of this property, isn't that true? A. That is correct.

Q. In other words, there has been no definite offer made to you by anyone for the property?

A. I think I could have had one or two but they weren't of a price on the basis I felt I could operate.

Q. But you have actually received no offer?

A. I have actually received no checks. I have not entertained them. I haven't asked for them.

Q. So that you do not propose to say to the court at this time that you can or cannot make a sale at more advantageous terms?

A. I think I explained that to his Honor.

Q. It is based purely on what you have learned in reference to the possible value of the property?

A. I have been doing this a good many years, your [38] Honor, and I feel very positive that with the sales, with the briskness in the market of oil royalties we should be able to liquidate this and pay off everybody—clean up the whole estate and that is what I am told I should do.

Q. At the time that the sale was confirmed by Referee Dickson it was then your opinion that on the basis of the facts then known to you and the then market conditions that it was an advantageous sale? A. Yes.

Mr. Lynch: That is all.

I think possibly it might be helpful to the court if I very briefly explained something about the character of this property and exactly what this sale is.

This estate has two parcels of real property fronting on Channel No. 3 at Long Beach. One consists of six acres and one of three acres. Both properties were leased after bankruptcy by and with the approval of the court to the Universal-Consolidated Oil Company for the purpose of drilling and producing oil.

The lease reserves to the trustee in bankruptcy 35 per cent. The Universal-Consolidated Oil Company has drilled on both properties. Oil has been produced as the trustee has testified.

Now, this sale was of all the fee in and to the six-acre parcel, reserving to the trustee in bankruptcy only, [39] all of the rights of the trustee under the present oil lease. In other words, so long as that lease continued in existence and so long as the Universal-Consolidated Oil Company continued to produce under that lease. All the royalties payable under the lease are payable to the trustee in bankruptcy.

The trustee is parting with no title to the three-acre parcel either in fee or oil rights.

Mr. Iverson: If it please the court, my name is Paul Iverson. I am representing the Security-First National Bank.

I might state first that the Security Bank is very much interested in seeing this estate liquidated and all creditors paid and if the bank felt certain that there would be a liquidation of this estate within a reasonable time where the sum of \$300,000 or \$600,000 would be received, I am certain they would have the absolute cooperation of the bank.

However, I might point out to this court a fact which is probably not known to this court, but is well known to the rest of us. That is, that this estate has been in receivership and bankruptcy now for over 13 years and every time we have a substantial sale of an asset or anything done toward liquidating the estate we have something brought before the court, by either the trustee or the bankrupt or [40] the unsecured creditors, which would indicate that there is to be a refinancing or a sale of all of the assets which will bail everybody out.

This court is not familiar with the record and for that purpose I am going to read part of the proceedings before the Referee at the time this sale came on for approval before the Referee.

The statement was made on the witness stand by the president of the bankrupt corporation that he then had a refinancing scheme and he had—I am not sure whether he said a commitment, but an offer from financial institutions which would give sufficient funds to pay everyone off in full.

Under cross examination we brought out these various things. I am reading now from page 236, beginning with line 9, of the transcript before this court:

“Q. Going to this refinancing, as a matter of fact, Mr. Newport, in 1935, 12 years ago, when the Security-First National Bank was before Judge McCormick, asking for permission to foreclose on your assets, you at that time stated to Judge McCormick that you had a refinance program, did you not?

“A. We thought we did with the R. F. C.

“Q. And you so stated to Judge McCormick?

“A. I did. [41]

"Q. And in 1924 when this matter was before Referee Utley and there was a proposed sale of the San Fernando property, you stated then that you had a refinancing program?

"A. Yes, at that time we were negotiating it.

"Q. And you stated before Referee Utley that you had a refinancing program?

"A. We stated the loan was being negotiated.

"Q. And in 1944, before Referee Utley, when the Security Bank was again trying to foreclose, you stated to Referee Utley that you had a refinancing program, didn't you?

"A. I said we were negotiating one; I didn't state it."

Your Honor, every time any type of sale or attempt to foreclose or liquidate the assets of a substantial amount has been brought before the court there has always been something thrown up which would indicate we were about to the point where we were going to refinance the thing or sell to someone whereby everyone will be paid off in full.

Now, as has been stated, there is no definite offer here. If they had a definite offer, a commitment, the bank would be one of the first to back away from this sale. We don't want to see the assets sold and get partial payment if it is possible to get complete payment. [42]

As I said, we still have an obligation to the Security Bank—that is, the bankrupt estate will have, of approximately \$150,000 or in excess even of this sale.

I wish also to call to the court's attention the fact that by and large practically all of the income to this estate during the bankruptcy proceeding has been from oil—from the oil wells. By the sale of this real estate

to Procter & Gamble the trustee is reserving that oil income from the property. They are not giving that up. They will still get the oil income from this property and this \$198,000 is just for the surface rights and they still will be getting that oil property income.

Mr. Metcalf has stated that in this time the trustee has received over one million dollars from oil and that is not being given away.

The statement was made here that there were three zones, three oil zones, under this particular property, and there was an intimation made that there had not been a proper determination of whether the zones had been explored properly. Maybe the trustee was giving up some oil rights in the lower zones. That was gone into very thoroughly in the hearing before the Referee as to whether or not there was oil in the other zones below the one that is now producing.

I might state for the information of this court that there are apparently three oil zones under this property. [43] One is called the Ranger zone. Another is called the Ford zone. And another is called 237 zone. There is a well on the six acres that is producing from the Ranger zone now. The Ford zone was explored by the Universal-Consolidated. A well was deepened into that zone and the Universal-Consolidated did not, in their opinion, get oil in commercial quantities and so they filled it in.

Now, there is a great question as to whether there is any oil in the 237 zone, which is even deeper in that particular location. So, although there may be oil below the property there has been an attempt to recover it before this transaction was made.

This matter was approved by the Referee approximately three months ago. And as the trustee has stated, the increase in oil prices took place, practically all of them, before that time. There hasn't been too large an increase in oil prices since December 1st.

The Court: Was that matter presented to the Referee?

Mr. Iverson: The increase in oil price?

The Court: Yes.

Mr. Iverson: Everything was gone into at the time, your Honor.

The Court: Before him three months ago?

Mr. Iverson: Everything was gone into. In fact this matter took—we would hear it one day and continue it over [44] a period of probably two or three weeks to hear the matter. There were probably a total of five or six days in the actual hearing and the Referee went into the thing very thoroughly before this matter was approved.

Now, we cannot see what has happened since December 1st which would in any way change the situation to upset this sale. There has been some talk to the trustee that he might be able to get more money if he sold all the estate, but he has no definite offer and as I said before, your Honor, every time we come up for a sale of an asset there is always something thrown up that they are about to refinance or about to resell or something which will bail all the creditors out.

The Witness: If your Honor will permit me to answer that—

The Court: Certainly.

The Witness: The testimony of this bank in my affairs has been shocking, utterly shocking. I can prove it. They have been universally wrong. The testimony is

they have gotten about 80 per cent of the income, the total income. They have been paid down to practically nothing. They have interfered with every sale I have attempted to hold up or make. I may explain, your Honor, a man went into the bank and bought a lot under my care. They didn't send him to me. He offered \$900.00 for it. He came over to me [45] and I threw him out. Definitely I threw him out. I said, "Either you are crazy or I am crazy. Get out."

The bank called me up and intimated I might be sued on my bond. I suggested they run their bank and let me attend to my business. We sold the lot for twenty-odd hundred dollars. I think \$2,500.00.

That has been the thing right along. Now, the bank testified—to start this affair they had three geophysical experts who testified there was no oil in the Long Beach Harbor. They were three prominent people. They testified they were going to lose one million dollars in this estate. That testimony was had. They would lose one million dollars. They have had one million dollars. Instead of losing it they have had it and they don't stand to lose a dime. Their principal has all been paid. They are working on interest now.

I think they have had one and one-half per cent interest. If we bail out and pay the rest of this they will get six or seven or eight per cent on their money. I don't know what the bank wants. I wish to heavens they would let me run this and let me attend to the real estate end of it.

The Court: Why do you think they are objecting to this confirmation?

The Witness: My God, I don't know, and taking this loss. [46] God knows, your Honor, I don't know why it was they forced us to sell a half mile square in the San Fernando Valley for \$65,000 and throw in 85 acres of

hill land. I objected to it. The court said it was the best offer I had. "You have been eight years here." I didn't have the heart to fight it. It is pitiful, your Honor. If I had it today we would be out of bankruptcy.

Mr. Cahill: I have no further questions, Mr. Metcalf. And I don't think other counsel have.

The Court: Who represents the successful bidder here? Have you anything to say?

Mr. McCraney: Yes, your Honor.

The Court: I would like to hear from you.

Mr. McCraney: We feel, of course, that we are somewhat in the middle on this. As Mr. Metcalf says, our relations have been very amicable and we assumed we could work out a deal that was satisfactory to all the parties.

The Witness: Grand people, your Honor.

Mr. McCraney: We are in a poor position to come before the court and attempt to limit an examination into the problem, because, as your Honor said, and as counsel said, surely the trustee is entitled to be heard as to what his present feelings are on the merits of the sale.

I would like to say a little something to clear up just what we are getting. It is true we are buying the [47] fee subject to our obligation, subject to the right of the trustee to receive this royalty during the term of this Universal lease. But, of course, we are primarily interested in the surface and not the oil and as long as those surface installations stay there on a substantial portion of the property we are very seriously limited in the use we can make of the property.

We feel that the price is fair on the thing. As to the wisdom of the trustee selling or not selling, that is a matter within the trust and not properly our decision. But as one point of caution I would suggest that if the

court comes to the conclusion that the sale should not be confirmed that, rather than simply putting us out in the cold, as it were, that the matter be held up pending some possible adjustment that might protect the bankrupt estate in its right in the oil. In other words, as I say, we are not in the oil business and the reason we want the oil is not, and I think this is true when I say it, not that we want to go into the oil business but we don't want to have somebody come in there where we have a soap factory and give them a right to drill for oil and have such a restriction on our use of the surface of the property.

That was our primary consideration in asking that we get the fee at the expiration of the lease rather than leaving the oil rights in the trustee for all time to come. [48] The trustee wouldn't do it but there are a lot of people in the world who would enjoy holding up Procter & Gamble if they had some kind of mineral right they could enforce. So, that is my suggestion, that we consider the possibility of something that may be done to protect the trustee on his oil rights. It may not work. I don't know. My people may not want to pay all that money if they have to change the terms, but I recommend against a flat disaffirmance of the sale if there is any possibility of working this thing out.

The Court: So you want your sale confirmed?

Mr. McCraney: We want the sale confirmed as it is, of course. I think it might be well for the court to consider this other point. Mr. Metcalf has referred to possible sales based on a price of \$700,000. Such a sale refers to the land and the oil on two tracts and not one. If the sale were made then the bankrupt estate would not continue to receive the royalties they have been receiving.

In determining just how fair our offer is I think it is necessary to determine what would be the net to the bank-

rupt estate if such a sale were made and what portion of that net would be properly attributable to the part that we are buying. I am not sure that it would turn out. They are getting a lot more money for that than we are willing to pay. It may be that Mr. Metcalf, as he says, would be aided in selling. [49]

The Court: But he would still have to negotiate with the Government.

Mr. McCraney: Yes, sir. And also still faced with the fact, as Mr. Metcalf has said, that these are not firm offers.

The Court: The Government is not an easy man to negotiate with when it comes to paying taxes. That has been my experience in cases in my court. That is the law. They have to follow the law. This is a tax payable to the Government and it is natural the administrative offices have to follow the law.

After you pay that what is there left in this future contemplation of getting \$500,000 or \$700,000 if you pay that over and above your price?

Mr. McCraney: I don't know. I don't know. Mr. Metcalf, do you?

The Witness: Yes, yes.

The Court: What would there be left?

The Witness: I might settle it, your Honor, on the basis of 29 per cent and not pay anything except as I receive the money later. We have discussed many avenues of this and I think, your Honor, I think from what these gentlemen say, I think if we send a man to Washington, and strictly within the law—

Mr. Cahill: I will state to your Honor that, answering your Honor's question, in the viewpoint of the tax law ordinarily, as your Honor knows, a bankrupt estate

pays no [50] income tax on sales. The reason for it is it is in liquidation. It was held in this case that Mr. Metcalf was not liquidating; that he was conducting a business and therefore under an amendment by an Act of Congress a trustee in bankruptcy or a receiver conducts a business and naturally he should pay income taxes like anybody else. So, the problem here is that this estate is required to pay income tax on the revenues by way of royalties. Our relief, it seems to me, is to move from this operating receivership to a liquidating bankruptcy through the filing of a Chapter 10 proceeding.

Judge McCormick has pointed out informally a number of times the possibility of doing this.

It is my understanding from conferences I have had with tax officials that if it were purely a liquidation process it would be tax free. We propose to move from this proceeding to a Chapter 10 reorganization proceeding.

As I stated to your Honor, I have no further questions of Mr. Metcalf. I am now prepared to assume the burden of proceeding in the regular manner with the petition filed for review of the order which would contemplate pointing out to your Honor the errors that we see have been made in that order. They are numerous.

The Court: In other words you have no further evidence you wish to present before the court? [51]

Mr. Cahill: No, your Honor.

The Court: Do any of the other parties want to present any evidence in addition to that which is in the record before the Referee?

Mr. McCraney: Not I.

Mr. Iverson: No, your Honor.

Mr. Lynch: Not I.

The Court: In addition to what is in the record before the Referee.

Mr. McCraney: Not I.

Mr. Iverson: No.

Mr. Lynch: Not I.

Mr. Cahill: You are excused, Mr. Metcalf.

The Court: You are excused, Mr. Trustee.

Now, you want to be heard upon the record before the Referee?

Mr. Cahill: Yes.

The Court: You may proceed.

Mr. Cahill: I have stated to your Honor heretofore that the creditors I represent amount to a sum slightly in excess of \$80,000. I neglected to state the unsecured claim of the Bank of America, it being also a secured creditor but has unsecured claims in the amount of \$64,000. So, if \$200,000 represents the unsecured claims referred to by the trustee, \$144,419 of that amount is represented by Mr. Nelson and [52] myself.

I desire, first, to direct your Honor's attention to the objections that were filed in writing, prepared by my office or me personally and are set forth in nine typewritten pages.

I might pause to inquire of your Honor whether your Honor has had an opportunity to read the certificate on review.

The Court: No, I have not.

Mr. Cahill: Or the transcript.

The Court: No, I have not.

Mr. Cahill: Thank you, your Honor. Then briefly I will indicate to your Honor what the objections were.

The first objection set forth in Paragraph 1 had to do with the price. The objectors stated that in their opinion a fair market value of the property offered was \$400,000 and as such the offer of \$198,000 was entirely inadequate. That was objection No. 1.

Now, in support of that, Paragraph 2 stated that the lands were appraised about a year prior to the filing of the objections by an appraiser who was referred to in the sworn objection as a thoroughly competent appraiser, one who rendered a report to the bankrupt stating that the subject lands at a fair market value in the sum of \$391,386.60.

And finally, in support of the matter of the [53] inadequacy of price, the objectors stated that they were informed that, because of the tremendous development program by the City of Long Beach under way in reference to its harbor, as well as for a number of other well known reasons, that the fair market value of said lands had increased since said appraisal was made.

Now, we drop that subject matter then in the objections, if Your Honor please, and proceed to Paragraph 3 of the objections wherein we set forth that the conditions set forth in sub-paragraph B of Paragraph 4 of the trustee's petition for confirmation, to the effect that the trustee shall convey to the buyer "all minerals, oil, gas and other hydrocarbon substances in or produced upon said lands," reserving only to the trustee the rents or royalties under the present lease with Universal-Consolidated Oil Company, is not only inequitable and unjust but highly dangerous in a business sense as to the trustee, and will, as your objectors are informed and believe, operate to the detriment of the within estate and to their rights therein by causing a loss to the estate which may

exceed in amount the total purchase price of \$198,000 offered by the proposed purchaser.

And then we specified, if Your Honor please, under sub-paragraphs A and B, why we believe that.

Under "A" we stated it was our belief and information that had come to the objectors and therefore we allege, [54] that because of the difference in value to royalty buyers between minerals in place and owned by the sellers and rents and royalties under a lease, that the value of the estate herein of its interest in the oil and gas yet to be recovered from said lands, will drop fifty per cent immediately upon the transfer of said lands under said condition and that said depreciation will take place solely because of said condition. And we believe that much more now, Your Honor.

I will pause to say we feel that we have proved that before the Referee by thoroughly competent experts and we felt that while the Referee commented on the inadequacy of the price, at the end he made no comment on this matter at all, so the point of the objectors to the conditions under "A" was simply that a royalty buyer will immediately say, "Well, I would have given you, if you could place the minerals in place to me before you made this sale to Procter & Gamble, I would have given you a dollar. Now, I will give you fifty cents."

Now, under "B" we set forth as follows. that in addition the estate under said conditions and notwithstanding said reservations of its rights under the lease, will be in grave danger of taking an equally great loss by being deprived in the future of all rents and royalties now being received by said trustee through his present lease with the Universal-Consolidated Oil Company. We stated the

reason was obvious. "Universal-Consolidated Oil Company has the [55] right to abandon its lease with the trustee at any time by quitclaiming the demised premises to said trustee, or otherwise."

We state further:

"If that were done today the trustee has a perfect legal right to lease said lands to other oil companies. It is common knowledge that in the Los Angeles Basin lands are frequently re-leased profitably after the original lessee-producer has abandoned his lease."

We further state that he would also have the right, following such an abandonment or quitclaiming, to enter upon said lands and produce the wells now located thereon and taking the entire production to himself.

And reading further:

"Both of said rights will be immediately lost to the trustee because of said condition."

And we said further:

"It is equally obvious that the proposed purchaser could under said condition, with perfect legal right approach said Universal-Consolidated Oil Company the day after the proposed purchaser acquired title, as proposed, and offer to said oil company any sum from one dollar to a million dollars that it thought said oil company would accept as an inducement to abandon its lease or to quitclaim said described lands." [56]

And we finally said,

"And the day after that happened the purchaser could release the same lands with perfect legal right

to Universal-Consolidated Oil Company, or to any other person, and the trustee would not only no longer have any interest in the oil and gas produced from said lands or the rents or royalties therefrom, but he would have no right to complain of any such transaction, because under said condition he not only leaves himself wide open to the happening of such a transaction, but even though unintentionally, he almost invites it."

Mr. McCraney: Do you say that objection still obtains after the offer I agreed to stipulate to?

Mr. Cahill: Yes, just as Mr. Metcalf pointed out, the Universal-Consolidated Oil Company still retains clearly the right under its contract to quitclaim at any time for any reason of its own and to abandon it at any time for any reason of its own.

If you could or your purchaser could have Universal-Consolidated Oil Company standing with you there and making certain commitments that they wouldn't abandon for 15 years, wouldn't quitclaim for 15 years, then, as Mr. Metcalf said, you would possibly have met fully the objection and not half of it. Have I answered your question? [57]

Mr. McCraney: May I ask, does my agreement to stipulate and to agree completely meet your objection here that we might approach them and buy out their interests?

Mr. Cahill: It does not protect us for the 15-year period.

Mr. McCraney: We can't control a decision they might make to give up the lease.

Mr. Cahill: That is our point.

Now, we have already covered two main points of the objections and we proceed with Paragraph 3 to an entirely different objection.

We state that underlying the oil sands now being produced there are two lower oil sands known as the Ford zone and the 237 zone. We say they are now being produced profitably on adjacent and adjoining lands from wells that are within at least but a few hundred feet from wells now on the lands proposed to be sold under said conditions.

We state that as of this time Universal-Consolidated Oil Company has not produced from either of said lower zones and may or may not be interested in producing from them, but that under conditions as they now exist the trustee has the right to produce from those lower sands or to contract to do so with other oil companies in the event that Universal-Consolidated Oil Company should elect not to produce from those lower sands or quitclaim said lands or abandon their [58] lease.

Then we point out the trustee's right to so produce the lower sands upon the happening of any or all of said events.

And then we allege—we objected for that reason, that the loss thereby which might be suffered by the estate would be in a sum far in excess of the proposed total purchase price of \$198,000.

Then we set forth finally under that paragraph the total oil produced, which Your Honor is familiar with because of the questions I propounded to Mr. Metcalf, in the amount of \$1,231,901.87 of royalties received and banked by the trustee and the \$469,477.06 of royalties

actually banked by him were attributable to this particular parcel, the six acres.

Then we move to another ground of our objections which is set forth under Paragraph 4. We state that the offer of \$198,000 is not in reality an offer that sum at all because as set forth in sub-paragraph D of Paragraph 4 of the trustee's petition for confirmation, the proposed purchaser attaches still another condition to his offer and that is that the trustee shall pay all costs for moving "all storage tanks, power poles, oil lines, sumps, steam lines, and concrete walls," now located upon the lands.

There was an indication by the objections that there [59] was danger that while the trustee was engaged in those operations of flooding or some other damage and that he, the trustee, and the estate would be liable for it.

The cost of moving the above items was estimated at fifteen or sixteen thousand dollars. We stated that there was no assurance that it might not be even double or treble that figure and that we were reliably informed that the cost would be approximately \$33,000.

The trustee met that at the hearing by bringing in a written offer from a responsible company for \$22,000 which was considerably over their estimate of fifteen or sixteen.

Then in Paragraph 5 we proceeded to another objection and that had to do, if Your Honor please, with the fact that this sale under the present method of operation, as an operating receivership, would require in addition to the cost of removal of the equipment another deduction—Uncle Sam's share because of the profit on the sale

which would further reduce sharply the amount available to pay the Security Trust Company.

We also stated that the debtor's ability to rehabilitate himself through a plan of reorganization now being worked out, with the aid and cooperation of a number of his important creditors, would in no way be aided by the approximate sum of \$140,000 which would remain after deducting expenses of equipment removal, income taxes and so forth. [60] Just to the contrary, he would be delayed and possibly defeated.

We submitted finally as a reason thereunder on that ground of objection, that if thereafter the trustee as lessor and the Universal-Consolidated Oil Company desired to extend the term of the lease or to modify the lease for their mutual benefit they couldn't do so without the consent of the proposed purchaser and it is self-evident that such consent would be withheld.

I stated finally that the legal question that arises under such consideration has possibly been decided in an oil and gas case by the Supreme Court of Oklahoma and the precise question has recently been placed before the California Supreme Court, which court has referred the matter to the District Court of Appeal for the Fourth District for decision.

I might state to Your Honor that that was my own case which was decided adversely to me by the District Court of Appeal of this State, which has, as I indicated here, adopted the decision of the Supreme Court of Okla-

homa which I indicated I thought would likely become the law in California.

The final objection is set forth in Paragraph 6 and is as follows—it sets forth facts there that the bankrupt has obtained a commitment in the sum of \$400,000 from a life [61] insurance company and an additional \$75,000 working capital, and that his plan of rehabilitation would be interfered with by this sale.

There were other creditors and they filed written objections. Their objections were very brief. They raised this point, which I thought at the time had merit and I presented evidence under it. They say the record does not indicate that a sufficient public advertisement of the sale of the property had been made to enlist the interest of proposed buyers able and willing to purchase the land—purchase land of the character proposed to be sold.

“That the contemplated sale price of the property does not appear to be its fair market value in view of the statement of the trustee herein, made by written communication to the Referee herein, dated July 2nd, 1947, to the effect that the trustee was asking \$374,000 for the Wilmington property.”

As a final objection it was alleged that the sale of the property, imposing upon the trustee the obligation to remove the obstructions upon the property, would create a personal liability for damages incurred in the operation and to the extent of the power in the trustee to engage in such operations.

Now, the Referee at the conclusion of the taking of evidence made a statement. He said [62]

“Gentlemen, I see a man sitting out there in the courtroom and he is expecting a commission in this matter, a real estate broker’s commission.”

And he said:

“I will state now that I told him that if he contacted a buyer that I would see that he got compensation for his time and his license as a broker, and the compensation, I told him, should not exceed \$5,000 regardless of what the price was.” And he said,

“Gentlemen, I am going to make an order confirming the sale.” He said, “I elect to take the appraisal of Mr. Mason,” and he walked off the bench.

Now, the importance of that will soon be seen when I direct Your Honor’s attention to our written petition for review of the said order. Those objections are set forth in 12 typewritten pages and I will try to be very, very brief in getting them before Your Honor.

We recite the fact of the filing of the petition and of the objections—

The Court: It is twelve o’clock, and we will recess until two o’clock this afternoon.

Mr. Cahill: Thank you, Your Honor.

(Whereupon, at 12:00 o’clock noon, a recess was taken until 2:00 o’clock p.m. of the same day.) [63]

Los Angeles, California, Thursday, March 11, 1948
2:00 P. M.

The Court: You may proceed.

The Clerk: In the matter of F. P. Newport Corporation, Limited, No. 25308-M.

The Court: You may proceed.

Mr. Cahill: I am forced to address Your Honor under slight difficulty. I have been battling a sort of laryngitis for three days and taken orally penicillin.

The Court: You may take it easy; don't exert yourself.

Mr. Cahill: My throat dries every once in a while and I am in some difficulty and have to pause.

The Court: Don't let that disturb you. I understand it.

Mr. Cahill: Just before the recess I started to direct Your Honor's attention to just what we stated in the petition for review of the Referee's order and I had proceeded to the point that, after setting forth the historical record of the filing of the petition for confirmation and of the objections and of what the objections set forth. We then proceeded to set forth a recital of what took place at the hearing.

I recited that the hearing was held over various days in November and December and then we move to Paragraph 9 on page 6 of the written objections and we set forth the following:

"That said order was and is erroneous in that: [64]

"(a) It in effect overrules and denies all of the said objections notwithstanding that the evidence presented and received in support of the said objections,

not only fully supported and sustained said objections but was practically uncontradicted as to all matters set forth in said objections with the single exception of the question of present fair market value.

“(b) That it authorizes the sale by the trustee, over the written objections of possibly a great majority of the creditors, of a valuable asset of the within estate at a grossly inadequate price, believed by your petitioners to be approximately one-half of the fair market value of said six-acre parcel, which belief is supported by the testimony of the witness Higgins, who, as chief valuation engineer for the Southern Pacific Company, placed a value of \$60,000 per acre upon said six-acre parcel, same being exactly the value his company had placed upon its adjoining lands which he held to be exactly comparable.

“(c) That it authorizes the sale upon the terms demanded by the purchaser in reference to the transfer of the mineral rights, whereby the trustee, being no longer the owner of the minerals in place, [65] but having only a royalty interest therein expressly limited to the present lease, will become immediately subject to the possibility of immediate and complete loss of the remaining oil and gas, not only as to the present producing sands, but also as to the said productive lower sands.

“(d) That said proposed sale is unwise in this, that it changes a sound business and legal relationship now existing as to oil and gas remaining to be recovered from said lands, into an uncertain one subject not only in a certain sense to the whim or caprice of the present lessee, but subject also to the

facts that upon any day after the sale, either for a small or large consideration paid by the proposed buyer to the present lessee, or for no consideration whatsoever so paid, the trustee can be fully and finally divested of all remaining interest in the oil and gas from said lands by the present lessee by simply informing the trustee that he has quitclaimed said lands, as authorized in said lease, or that he has abandoned said lease in its entirety.

“(e) That all of the testimony as to present fair market value has been ignored but said order is predicated upon findings that notes only an appraisal made in either December 1945, or January [66] 1946, whereas all of the testimony as to present fair market value disclosed that all lands in the Long Beach Harbor area have greatly increased in the two-year period that followed said appraisal.

“(f) That the trustee admitted that he has not advertised the property for sale in any manner, except a brief notice in the Los Angeles Daily Journal, notwithstanding the fact that when he did extensively advertise said property for sale in January 1946, in newspapers in various large cities upon both coasts, that he received, in the then not nearly so favorable market, numerous inquiries from corporations, brokers, and others.

“(g) That as late as July 2nd, 1947, the trustee believed that a buyer could be secured for said six-acre parcel in the sum of \$374,000 for as shown by the evidence he wrote the Referee herein, on that day, to that effect.

“(h) That as shown by the uncontradicted evidence, the trustee will be required, under the drastic terms of sale imposed by the buyer, not only to assume the risk of damage to person and property through fire, explosion, or otherwise; through the removing of the oil tank farm equipment to lands not proposed to be sold at this time but also to pay from [67] the funds of the within estate the minimum sum of \$20,378 for such removal.

“(1) That it ignores the recommendation of A. A. Carrey, who has been the petroleum geologist and engineer advising the trustee herein, as to the oil and gas upon said lands, for a number of years. That the said lands not be sold upon the drastic terms imposed by the buyer as to the transfer of the mineral rights, because an immediate loss will be suffered by the estate in the depreciation of the market value of the mineral rights. The uncontradicted testimony of Mr. Carrey is on this point in part as follows:

“‘It is my opinion that if this sale is made that the present landowner, the F. P. Newport Corporation, will suffer a decided loss in the sale value of their landowner’s interest.’

“(j) That it ignores the recommendation of Mr. Carrey that the sale be not made for an entirely different reason stated by him as follows:

“‘I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has not power to prevent the present [68] operating company from terminating said lease,

and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.'

“(k) That it directs the payment of an alleged real estate broker's commission in the sum of \$5,000 through an attorney at law, who is apparently also licensed as a real estate broker, notwithstanding the fact that said attorney was at no time employed by the trustee herein in any capacity,—attorney, broker, or otherwise, and that it appears from the uncontradicted testimony that said attorney and the proposed purchaser entered into an agreement, without the knowledge of the trustee, that said attorney would be paid a 'finder fee'. As such this obligation would appear to be that of the party found and not the obligation of the trustee who had no agreement in writing, as required by the laws of the State of California, with any person for his employment as a broker, or otherwise or at all.

“In this regard it should be noted that the trustee herein is a licensed real estate broker, who is allowed fees from time to time for his services as trustee herein, including \$3,000 allowed him on December 23rd, 1947, for services rendered in 1947, and, that the record herein discloses that said [69] trustee, about the month of January 1945, received an offer of purchase from the present proposed purchaser, for the same six-acre parcel, in the sum of \$180,000, which offer the trustee declined, he then having a higher offer; and that thereafter said attorney-broker conferred with the Referee herein and asked if a commission would be paid him if he was successful

in finding a purchaser for said land; and that the Referee expressed an opinion that a commission would be paid because of the fact that he did not recall of sales of real estate being made before him where some real estate broker was not paid a commission; and that thereupon the said attorney wrote a letter to the corporation whose offer had been so declined by the trustee herein, and finding a continuing interest in the property upon its part here thereupon entered into said agreement for a 'finders fee.'

"The practice of buyers employing agents to secure scarce merchandise, or to induce reluctant owners to sell real estate, has developed in this period of scarcity, but the fee to be paid therefor is a fee to be paid by the buyer for whom the service is rendered, and is never a burden to be imposed upon the seller. In any event, such fees are not contem- [70] plated by the provisions of the National Bankruptcy Act and cannot be sustained and most certainly not under the circumstances here."

And the final sub-paragraph (1):

"(1) That creditors herein have received no notice whatsoever as required by law of a hearing of a petition for the allowance to said attorney-broker of either a real estate commission or a 'finders fee.' The petition filed by the trustee herein failed to request authority to pay any such commission or fee to any person whomsoever and the notice thereof to creditors stated only the facts set forth in said petition."

And that ends, Your Honor, this long paragraph 9 wherein we set forth the reasons that we believe the order is erroneous.

The rest of our objection was confined to two short paragraphs, 10 and 11, wherein we simply state that the ability of the debtor to rehabilitate himself through a plan of organization now worked out will in no way be aided by the approximate sum of \$140,000 which will remain after deducting expenses of equipment removal, income taxes, as shown by the letter of the Western States Life Insurance Company, received in evidence herein, through the inability of the debtor to secure the loan proposed to be made by said [71] company in the sum of \$400,000, with said six-acre parcel, it appearing that said company's appraisers have placed a high value upon said parcel including the mineral rights in place; which facts were clearly established by the evidence upon said hearing, but which are disregarded entirely by said order.

And finally paragraph 11:

"That no findings of any kind have been made upon the principal objections set forth in said written objections, your petitioners must therefore request that a transcript be prepared to include all matters received in evidence at said hearings, with the exception of the matters received by reference."

Well, the trustee was offering to supply the transcript but the Referee was unwilling for him to pay for it and the bankrupt, of the present bankrupt corporation, supplied the transcript.

Now, Your Honor will realize that what I have said there is either sustainable by what is in this transcript

or it is not. This is the transcript of all the testimony given in the case and it contains 242 pages.

Of interest are the last two lines appearing on page 242, lines 25 and 26:

“This concludes all the testimony in the case. Argument that ensued left out by request of counsel.” [72]

As such it does not include the statement made by the Referee after the taking of the evidence and shortly before he walked off the bench. He said:

“Gentlemen, I see a man out there,” as I stated this morning, “who expects a commission.”

There was no evidence whatsoever, of course, in the record to that effect and of course, the statement by the Referee could not, I believe, be considered as evidence in the case.

Now, Your Honor, without trying to go through this transcript and read to Your Honor the portions thereof that in my opinion sustain the objections set forth, I will state to Your Honor that I have in the last few days and nights, very carefully read the transcript. I think it took some four hours in the manner in which I read it. And in doing it I made notes as to certain pages and as to the testimony of certain individuals which I thought were of, not only extreme importance, but I thought they were practically controlling.

The portions to be read there are short in most places. They consist of only a few lines and I believe they should be read to Your Honor under my statement of just which one of these objections we are now presenting this evidence for consideration.

At the outset allow me to state to Your Honor that [73] as to the question of price, whether the price was fair, whether the price represented the fair market value or anything close to it, that it is usual in these cases where property of this caliber is involved and of this value, there are thoroughly competent experts on both sides and there were here. They were not only competent men but very distinguished and eminent men. The first expert called on behalf of the objectors was a man who stated that he had to give his testimony just that day because he was leaving for San Francisco. That was Mr. Harry C. Higgins.

He had been with the Southern Pacific Company for many, many years as their land appraiser—since 1922. He stated that he was now being transferred to San Francisco as the chief evaluation, chief engineer and land evaluation engineer of the Southern Pacific system.

Among other things he said since 1922:

“I have appraised over \$100,000,000 worth of properties including water front land in San Francisco, Oakland, Alameda, Portland, San Pedro, and Long Beach.”

So we would assume at the outset there was nothing to the contrary; that almost anything that that man said as to value should be just about the value.

What Mr. Higgins said was that he had made an appraisal long before this matter arose for the bankrupt; that he made it on January 30th, 1946, and that the appraisal [74] was in the sum of \$359,436.00.

Then he was asked if values had, in his opinion, increased after that and he replied—he was asked this question:

“Has the Southern Pacific Company recently evaluated its own lands, Mr. Higgins?”

And he said:

“Yes.”

And he was asked:

“At how much an acre?”

“I put \$60,000 per acre on the same land.”

He stated that was about six months ago. He was asked if that included the minerals under the lands of the Southern Pacific Company and he said it did not.

He was asked the question whether the lands of the Newport Corporation were comparable lands and he said that they were.

Now, after that we proceeded to another expert whose qualifications I noted a moment ago are set forth over ten pages of this transcript. He was called on behalf of the objectors. He was a Mr. Johnson.

He testified as to being an appraiser for the Federal courts in this district, for the State courts, and for the State of California. For many banking institutions, [75] including the Security-First National Bank of Los Angeles. And as a matter of fact he says:

“My first important employment in the appraisal profession in Los Angeles was for the Security-First National Bank of Los Angeles.”

And he said that he appraised 25 to 28 bank buildings that they purchased from the First National in that merger.

Mr. Johnson enumerated many appraisals that he made for the United States Government of war plants at San Diego and airplane factories and matters of that kind and generally established himself as a man with tremendous experience in the appraisal business.

He was for many years the chief appraiser for the Title Guaranty & Trust Company of Los Angeles, now the Merchants Title Insurance Trust Company.

Mr. Johnson was also asked if he had made an appraisal of the six-acre parcel and he said he had. He said:

“It doesn’t contain quite six acres—5.9906, I believe.”

“What was your appraisal?”

“A. \$391,000.”

That was an appraisal that he made in January 1946. He was asked if he made a re-appraisal and he said [76] he had. And:

“What is your present opinion as to the fair market value of the 6-acre parcel?”

“A. \$419,571.”

Just glancing at page 48. Experts called. Don’t know whether the bank called them or the trustee.

A. Mr. Mason was called. He set forth his qualifications as an appraiser of waterfront property for the State of California and various municipalities. He is outstanding. He put a very much lower appraisal on the property. I forget what it was but it was something very much closer to the price offered here.

So, Your Honor, there was that sharp conflict as to value and because of that I do not propose at this time to go into that matter any more than I have but rather proceed to what the objector thinks is the fundamental objection here, the primary objection, and that is what in the opinion of experts who should know, is the effect of the conditions attached by the proposed purchaser here that the mineral rights must pass at this time to the purchaser if the sale is confirmed, retaining only to the trustee the rights under the present lease.

Now, in that regard we called or we endeavored to produce Mr. A. A. Carrey, who for these many years has been on the payroll of the trustee under appointment of the Court. [77] Judge McCormick, as a technical adviser in reference to the gas and oil on this lease.

I might state, because I am sure it is beyond dispute, that his qualifications which finally were stated in here, were also outstanding; that he had a term of years, among other things, as chief geologist for the gas and oil producing company that is now the Texas Company. It had a different name at that time. He said he was chief geologist for that company and adviser to the City of Long Beach on its oil interests. He is a man of outstanding reputation.

Now, they couldn't get Mr. Carrey to testify—we couldn't get Mr. Carrey to testify when we needed him first so it was stipulated informally between the counsel for the trustee and myself, that Mr. Carrey would write a letter, as long as he was required to be in San Francisco, commenting upon the matter and that that letter would be received in evidence. The letter was written and the letter was placed in evidence and it appears in this trans-

cript at page 120-a, and I think that that letter should be, or pertinent parts, should be directed to Your Honor's special attention.

It is on the stationery of Mr. A. A. Carrey:

"Petroleum Geologist and Engineer,
"529 East Roosevelt Road,
"Long Beach, California."

The letter is dated November 17, 1947 and [78] addressed to:

"Mr. L. M. Cahill, Attorney at Law,
"606 South Hill Street,
"Los Angeles, California.

"Dear Mr. Cahill:

"The petition of H. F. Metcalf, Trustee, for the sale to the Proctor & Gamble Manufacturing Company of certain properties located within the Wilmington Oil Field has been brought to my attention. Said property is owned by the F. P. Newport Corporation and is at present leased and operated for oil by the Universal Consolidated Oil Company.

"I have been requested to study said petition and render any opinions that I might have in so far as said sale might affect the present and future economical operations of the wells now located on the property.

"I shall only attempt to base my opinion upon good oil field practice and the matter of operating leases. By way of qualification I might state that I have been actively interested in the oil business for 25 years, as a consulting petroleum geologist and engineer for 20 years, and more particularly I have been

the field agent for the trustee, Mr. H. F. Metcalf, in connection with [79] this particular property for approximately nine years.

“As a result of that experience I have had occasion to study the original lease many times and feel that I am familiar with the operations in so far as they affect this particular property.

“From a study of Paragraph B of the above mentioned fee, it appears to me that the sale of this property would change the present land owner's position in that the Newport Corporation would be the owner of a so-called ‘over-riding royalty,’ rather than as at present they are the owners of the mineral interest. Said sale would in a sense convert present oil and gas lease into a restrictive lease, in which case the termination period would be of prime importance. Such a restricted lease might preclude the possibility of the Newport Corporation operating the wells themselves sometime in the future.

“In explanation of the above statement, it will undoubtedly come to pass sometime in the future that the present operating company might feel that it is no longer profitable for them to operate under said lease. In such cases it has been found that the fee owner can often operate [80] such leases where an operating company, which has to pay high royalties cannot do so.

“It is my opinion that if this sale is made that the present land owner, the F. P. Newport Corporation, will suffer a decided loss in the sale value of their land owner's interest. It has been my experience that there are few buyers for overriding royalties,

as most royalty buyers prefer mineral interests. In each case where I have observed sales, it has been my experience that overriding royalties always bring considerably smaller prices than land owner's royalties or mineral deeds.

"I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is in the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has no power to prevent the present operating company from terminating said lease, and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.

"In answer to Paragraphs C and D, I do not believe that the changes in the physical equipment on the leases particularly work any hardships on an operating company. It may to [81] some extent limit their freedom in the matter of remodeling work and the handling of oils from the various wells, but I do not believe it will be serious enough to cause too great inconvenience.

"Hoping the above information will be of some assistance in clearing up some of the points in connection with said sale, I remain,

"Very truly yours,

"A. A. Carrey."

And that was received in evidence upon stipulation of counsel.

I will state to Your Honor that later Mr. Carrey did appear and did give testimony which also appears in this

transcript, wherein, as I read it the other night, it appeared to me to fully support everything he said in the letter.

An interesting thing developed during the course of his testimony. Previously a witness had been called, also a geologist and petroleum engineer of considerable standing, a Mr. Meade, and I asked the question which he was allowed not only to answer without objection, but as I recall he developed it at some degree:

“What in your opinion would be the loss to the estate from the purchaser, or the viewpoint of what a purchaser of a royalty interest would pay [82] where he could get only the over-riding royalty rather than the royalty that came from the minerals in place,”

and Mr. Meade answered that in his opinion it would be 25 per cent.

I asked the same question of Mr. Carrey and there was an objection which was sustained by the Referee, on the ground that it was too speculative, although it was his opinion that was sought.

I then made an offer of proof wherein I offered to prove by this witness that on that point he would testify that the loss would be far in excess of the 25 per cent testified to by Mr. Meade. There was an objection made and sustained to the offer of proof.

Now, while we are on that point we might look at what Mr. Meade said in reference to that and that appears at—I have noted it here as being at page 89 of the transcript. I think, however, before reading it I might just glance at his qualifications a little bit.

At page 84 he recites that he lives in Glendale, is a consulting engineer and geologist, engaged for the past 26

or 27 years as such; honor graduate of the University of Arizona in Geology and Mining Engineering. That he practiced in practically every state in the West, particularly in California; that he is a member of the American Institute of Mining and Metallurgical Engineers, and of the American [83] Association of Petroleum Engineers.

"I am a registered engineer in the State of California," and so forth.

He stated he was thoroughly familiar with the oil geology in California and particularly in the Los Angeles Basin and had made appraisals for estates and oil companies; for the George Getty Company and Eckert and Lloyd in the Ventura Oil Fields and so forth. Employed as a field examiner by the United States Land Office for a number of years. Employed by the United States Government on a case involving oil prices in the Kettleman Hills Oil Field. Employed by the State of California and:

"... quite a percentage of my work consists of appraising properties for inheritance tax purposes, both for the royalty owner and the operator."

So much for his qualifications. There is more of it but proceeding to page 89, line 9. It would look like I should go back a little bit beyond where I am starting but it isn't necessary when you read back there.

"That is correct. That is what I was endeavoring to state to the witness. I think you put it in better order. That the proposed sale does propose to convey all the mineral rights in the 6 acres, reserving, however, to the trustee such rights as he may have as the lessor under the present gas and oil lease [84] to the Universal Consolidated Company.

"Having those facts in mind, I will ask you if, in your opinion, such a proposed sale with such reservations is regarded as sound practice on the part of the land owner."

Then Mr. Lynch said:

"I object to the question on the ground it is not a subject for expert testimony. That is number one. Number two, it is wholly immaterial in this particular proceeding, there being no effort here to sell any oil royalty or rights under that lease. The only sale that is contemplated is the property, subject to that lease. And whether it is or not good practice is wholly immaterial in this proceeding."

Then the Referee said:

"I will let him answer. Maybe he can tell me something I have not heard before. When you say 'good practice' do you mean by that that is good business?"

"Mr. Cahill: Yes, the things commonly done by the landowners.

"The Referee: I do not think that is permissible, because you have a bankruptcy proceeding which commonly means liquidation and not operation. The whole intent of bankruptcy is to liquidate and pay the creditors. But if you want him to tell me whether [85] that is the business practice, I will listen to your answer.

"Mr. Cahill: It will be so limited as to this question.

"A. As I understand the question and the explanation, answering the question, I would say it

would not be, because the oil interest would be jeopardized and the owner of the property, who now has the property, would not get the oil rights after the expiration of the present lease.”

And Mr. Lynch said:

“We concede that.”

Now, along the thought of giving Your Honor, or, having the thought of giving Your Honor a viewpoint of just what the trustee’s position was then as not being too radically changed in this aspect, at least to some of the statements Mr. Metcalf made this morning on the witness stand, I would like to direct Your Honor’s attention to the statement made by the attorney for the trustee during the course of the hearing in reference to just what their analysis disclosed would be the business effect, the legal and business effect of the proposed transaction. And that is a statement made by Mr. Lynch in reference to the loss of rights to drill into the lower sands—lower zones, which appears at page 155, line 12.

I thought it was a very fair statement and I still think it is fair and I think it is important. [86]

Yes, that one I do have to read back a little bit to get the sense of it. It is part of a statement made by myself and appearing at page 155, line 12:

“Also, before we proceed, I would like to make this statement in reference to what Mr. Lynch said at the last hearing. Not answering Mr. Lynch in any way, but just an observation.

“We called an expert, Mr. Meade, for the primary purpose to render expert opinion as to whether underlying these lands in question were one or two horizons that have not been produced from, the Ford Zone or

the 237 Zone, or both of them. The witness rendered his opinion regarding that point. He was asked by myself or someone else to state his reasons and he stated many reasons. I thought in passing, and only in passing, he made this statement to Mr. Lynch as taken from the viewpoint that does not concern the objectors here at all, he said if he had been the petroleum engineer on the well he would have recommended production tests on Well No. 6 and be produced. Now, whether Well No. 6 should be produced is no part of the case here. It is simply a statement that the witness made in passing in support of his opinion. As far as we are concerned it is not a point at issue whether Well No. 6 should have been [87] produced heretofore or not. It is not a matter in the case so we might avoid possibly putting too much time on that particular point.

“I understand that Mr. Follansbee is here and he might be very helpful in giving his opinion as to whether the Ford Zone or the 237 Zone or both of them have any possibilities.”

I will pause for just a moment before reading Mr. Lynch's statement and state to your Honor the counter-expert called as to whether these lower horizons existed on this particular land, was an officer of the present lessee, Universal Consolidated Oil Company, and his name was Mr. Follansbee.

He expressed an opinion that as to the Ford Zone that it was not, in his opinion, at present; that it was there all right, but barren, or if not barren, that it could not be produced profitably, if I recall correctly. But I do recall on that point he said they had made no attempt to produce

the 237 Zone, so if he answered it at all on that he answered from outside matters.

Now, I approach what I started out to get before your Honor, Mr. Lynch's statement appearing at page 156, line 12:

"I am in agreement with Mr. Cahill in one respect: the question of whether or not this particular well [88] should have been put on production on the deeper zone is not involved in this proceeding. However, one question is involved in this proceeding and that is whether or not there is any production to be had from that lower zone.

"It was the information of the trustee and it was the information of his counsel that this particular well, No. 6, had been developed and drilled into that zone, and that production from that zone under this property was found to be not commercially profitable. Consequently we have felt that there has been an exploration of that zone and a determination that it is not a profitable venture. The trustee is not in any wise concerned in an effort to force this sale. If it is the conclusion of this Court that there may be a zone that can be profitably developed then I think, as I stated at the conclusion of the last hearing, that this sale should not be made because I think it should be made clear so that there will be no misunderstanding that if this sale goes through the right to develop any such zones, unless the Universal Consolidated Oil Company does it itself, is lost to this estate. In other words, if the Universal Consolidated Oil Company refuses to develop a zone which they think is unprofitable, or [89] for any other reason, this right to which counsel has referred of

forfeiture is lost to the estate—that passes to the purchaser. We would not be able by reason of any such failure on the part of the Universal Consolidated Oil Company to forfeit the lease in that respect and drill any wells or cause them to be drilled.”

Now, your Honor, in the light of that it might be interesting to note what the experts said as to the possibility of the existence of these two lower horizons, bearing in mind that from the uncontradicted testimony that from the horizons that have been produced the trustee has received from this six acres, just a few dollars short of a half million dollars.

Now, before proceeding to do that I should make this observation, that of the three experts, two called by the objectors and one called by the trustee or the Security Bank, there was some conflict. However, I don't think it was a very serious conflict.

Mr. Fallansbee, it is true an official of a producing oil company and the present lessee, did express an opinion as to the Ford Zone. It is predicted on the fact that his company had drilled into it; and while he admitted they found oil he qualified that by saying “Yes, there is oil there. We didn't think it would justify a production test and no production test was ever made on the well that [90] was drilled in the Ford Zone.”

He admitted very frankly that the 237 Zone had not been discovered at that time on adjoining land and they didn't drill down there, so he knew nothing of that on these particular lands.

The witness Carrey and the witness Mead give very, very positive testimony and I think very valuable testimony, which should be carefully considered by this court

in reference to the existence of those two horizons, noting that they are being produced on adjacent and adjoining lands successfully.

Now, Mr. Mead's opinion appears in the transcript at page 141 at line 10. The witness was discussing the proximity to other wells.

The record discloses:

"Mr. Cahill: Let me clear that up.

"Q. At a distance as close as three or four hundred feet from the Newport property there are wells producing now from the Ford Zone?

"A. There are wells now producing from the Ford Zone, that is right on the west."

That isn't important so I will move over to page 44 at line 4:

"Q. You want the Court to understand, Mr. Mead, it is your position that the Ford Zone does underlie this [91] 6-acre parcel?

"A. Yes, that is definitely my opinion.

"Q. Also that there is a possibility that the 237 Zone underlies this particular parcel?

"A. Yes, the 327 Zone undoubtedly underlies the property. Whether or not it is productive is something I would not be able to say until after an electric log was run, but I have no reason to doubt but what it would be productive.

"Q. Are you of the opinion from information you have that the Ford Zone is productive there?

"A. Yes, I am definitely of the opinion that the Ford Zone is productive.

“Q. On these lands under the 6-acre parcel?

“A. The portion to the west of the fault—the fault crosses under this property and there would be a portion of this property in which you could not encounter the Ford Zone.

“Q. What portion is that, approximately, Mr. Mead?

“A. That would be the portion of Parcel No. 2, a part of that.”

And he goes on with his description and so forth.

Now, on the same subject matter I will try to find the opinion of Mr. Carrey. It appears on page 198 at line 6. I might go back just a few lines to page 197 at line 23: [92]

“Mr. Cahill: Q. Assuming the Universal Consolidated Oil Company having before it the core log showing the possibility of productive sand between 5730 and 5750 feet, and then receiving an electric log and examining that log and concluded that it was doubtful that those sands would be productive—I am going to ask you to examine that log at that point and state whether in your opinion in any portion thereon which would indicate that it would not have been wise to run a production test?

“A. Well, my opinion is, and I felt at the time, and still feel, that there is there, was and still is some possibility of production. As I say, this is my opinion. If I had been on that well I believe, I am sure that I would have recommended that a solid string of pipe be run. I mean by that casing, and do certain under-framing between these points which showed some indication of oil or which place is between 5730 and -45.

“Q. Are there also other points in your opinion indicated which should have been tested?

“A. There are some points. The sands are not very thick, but I would have advised to run a solid string with proper type of cement job so that you could shoot the places for production. Not only [93] one place—you could try it first and then successively come on up and test these so that if the job was performed properly the various three or four or five places that indicate possibilities, some place may be only a foot, but the accumulation of all of them I think in my judgment would have possibly made some kind of an oil well.”

Then elsewhere Mr. Carrey on the same subject matter, page 199, line 14:

“Q. In your opinion the only method that can at all approach the conclusive is the production test.

“A. That is the only way that is final and conclusive, to prove the capabilities or productive qualities of any sand.”

Then he went on discussing the log further. Then he was asked on page 200 as to the existence of the 237 Zone, whether he had any knowledge concerning it. Page 200, line 9:

“Q. With reference to the 237 Zone, do you have any knowledge of that as to this particular area and these particular lots?

“A. That particular zone has not been tested in this six acres. The closest, I believe, is on the General Petroleum-Southern Pacific property.

“Q. How far away is that—that is, the well [94] that has the test on it?

“A. I would have to measure it on the map but I would say it is probably seven or eight hundred feet or maybe a thousand feet, without measuring it.

“Q. Is it productive there?

“A. Later they found some zone—

“Q. Do you have an opinion whether that zone might underlie the 6-acre parcel?

“A. I think the sands are there and I personally believe that there might be a chance. There is a fair chance of production. The location, however, on the 6-acre parcel is not as good structurally as the Southern Pacific property. It is lower and it is closer to the fault that intersects that property. I base my opinion that the 237 Zone is possibly saturated to some degree to the fact that the Ford Zone had some saturation. It is reasonable to believe if the Ford sands had some oil in them that the sands that abut the schist there in the 237 will also, and they might have more saturation because the 237 Zone is a great deal more productive zone than the Ford Zone.

“Q. In other portions of the field?

“A. In other portions of the field the 237 Zone is a little better because the sands are thicker. [95] There was more thickness of sands in the 237 Zone than the Ford Zone.

“Q. The 237 Zone has never been tested on the Newport property, has it?

“A. No. It didn't go quite deep enough in this well.

"Q. You maintain wells drilled into that property on the 6 acres might have valuable production?

"A. You can't say it wouldn't, because it is within the boundaries of production in the Lower Terminal with the Ranger on the other side of the field. There is some saturation in that Ford Zone. I don't think anyone can say no, that it is impossible.

"Mr. Cahill: No further questions of this witness."

Now, your Honor, I am not going to point out—I did make notes on it here, the contrary testimony of the witness Fallansbee as to the Ford Zone. His testimony had largely to do with why they didn't run a production test after they drilled into it.

The witness Fallansbee I regarded, and I think the referee did and everyone else did, to be a thoroughly honest witness. Personally I felt then and now that his qualifications were by no means the qualifications of Mr. Carrey to express an opinion as to these particular lands, although they were high in this sense, that he was an official of [96] the company at the time they put this well, No. 6, into the Ford Zone.

It appeared to me that, as to the possibility of valuable production from the two lower horizons, that the referee, confronted with the testimony of Messrs. Carrey and Mead should have held with the objectors that there was a possibility of not only a loss under this particular condition by the purchaser here to the trustee and to the bankrupt estate and oil from the present horizon, but the possibility of oil from two lower horizons.

Now, your Honor, I note that there was reliance made by the trustee on the fact that the referee on an earlier

hearing, which was instituted in December, 1945, in reference to this particular piece of property, where there had been an offer of purchase by another company, which offer was later withdrawn by them before we approached this stage, that the referee appointed an appraiser to appraise the property. That appraiser was a young man just back from the war by the name of Mr. Cunningham, an attorney, who is now a Superior Court judge, recently appointed by Governor Warren.

Mr. Cunningham rendered a written appraisal and as I recall the appraisal was about \$212,000.

I refer to it here as to the time limit that was made and I notice that the transcript, at page 26, line 12, there is a reference to the time: [97]

“Mr. Lynch: I think the actual appraisal was made in December, 1945. May it be understood that is part of the record?”

“The Referee: That will be admitted by reference, yes.”

More than two years have gone by since that appraisal was made by Mr. Cunningham, and in those two years, as testified by Mr. Metcalf this morning, there have been four, up to the hearing, four price increases in the barrel of oil and there has been one since December 1, 1947.

The objectors, if your Honor please, have a feeling that that appraisal was rather remote under the changed circumstances and should not have been relied upon by the referee. Which brings me also to the matter of advertising, the objection having been raised by creditors other than those represented by myself, but as to which I joined in their objections and I believe so did the Bank of America, and I am just going to direct your Honor's at-

tention to the fact that the trustee, under my examination, established the time of the advertising—page 33, line 7. The trustee has just concluded testifying as to advertisements in papers in San Francisco, Seattle, Portland, Oregon, and—advertisements in the Portland Oregonian, San Francisco Chronicle, Seattle Post Intelligencer and various other papers, at the time when an offer had come in from an oil company in 1945—late [98] in the year. And then he was asked these questions, page 33, line 3:

“Q. Can you state what advertising you did at that time?

“A. The Portland Oregonian and the Chicago Tribune.

“Q. What dates, please?

“A. The first was January 11 to the 15th, 1945. No, that is January, 1946. Chicago Tribune, January 10-14; Long Beach Reporter five days, January 11, 15th, 18th, 22nd and 25th; and the Los Angeles Times, January 8th, 9th and 10th. The Los Angeles Examiner January 9th to the 13th, inclusive; and the Daily Shopping Guide, five days, in January, 1946. The aggregate cost of that was \$640.80.”

And that examination, by the way, was direct examination under his own counsel.

The cross examination on page 34 was as follows by Mr. Cahill—line 10:

“Q. These dates, you have read off of advertising in various newspapers were for what year?

“A. 1946.

“Q. All in 1946?

“A. Yes, they were practically in January.

"Q. Of that year? [99]

"A. Of that year.

"Q. What advertising and in what newspapers have you had, in 1947, in reference to the proposed sale?

"A. This proposed sale?

"Q. Yes.

"A. None in regard to this proposed sale. In the Long Beach Press-Telegram I advertised for about a week or ten days. And as a result of that I got some calls; and as a possible result of that I have two offers in my pocket now. I got them this morning, by the way, which may come before his Honor later.

"Q. When was that advertising done in the Long Beach paper?

"A. I guess six or eight months ago.

"Q. In the year 1947?

"A. That is right.

"Q. Is that advertising in the Long Beach paper you mentioned the only advertising that was done in reference to this property in 1947?

"A. It is all that I know of.

"Q. You say you did get some results from that advertising?

"A. I said so.

"Q. These offers you say you have in your pocket, [100] when were they received?

"A. This morning. I got them when I came to the office. I have been talking to Mr. Cahill for weeks. I had an offer here which he recently sent back and said, 'I'm unable to submit this offer, you must raise it.' "

I might pause there to say, your Honor, I am sure the words there "Mr. Cahill" are an error on the part of the reporter. I would supply the name there if I knew it, but I do not recall the right name.

The point made there, your Honor, was that whereas elsewhere Mr. Metcalf had testified on direct examination the advertising he did in January, 1946, which was then almost two years old and more than two years old now, he testified brought inquiries from brokers in New York, Chicago, Portland, Seattle and from companies such as Richfield Oil and named many, many companies. The thought was that if he got such excellent results in a period two years before that, apparently for a property of this kind to be disposed of, that there should have been substantial advertising in the great ports of the world or the great ports of the United States or the great manufacturing centers of the United States, bearing in mind that this is waterfront property and that large vessels can come in and do come in to this channel. [101]

Now, under the point that under the lease the lessors have the right to produce from the lower zones, I don't think that that was contradicted. I will state to your Honor the lease was put in evidence. The lease is a document that we spent many, many weeks—I think months in drawing, to get an instrument here that would give full protection to the trustee. It was drawn by the present counsel for the trustee, Messrs. Bailie, Turner and Lake, and we had the assistance of one of the outstanding oil attorneys of California, a member of that firm, Mr. Richard Turner.

Others, such as myself who had an interest in the matter, gave him all the help we could. As a result we then had and believe we have, an instrument here whereby

its terms in the event that Universal Consolidated Oil Company would abandon the lease—well, first, in the event they failed to produce all of the horizons we have a clause therein where the trustee may enter upon the land and produce himself. If they abandon the lease entirely, of course, the law would take care of that. We would simply enter and produce.

The clauses in there, the usual clauses that the lessee for any reason that he wants or no reason at all may quit claim all or any part of the premises at any time.

In the event he quit claims he agrees to get his property off of there within a reasonable time. [102]

I think we have adequate provisions there that we can take over the wells and casing and so forth and so on or he can quit claim a portion and hold certain wells, if I remember rightly.

Now, there were some of the clauses in there of such importance in my opinion, in a consideration of this question, that I call the fundamental question here that I had placed in the record while the whole lease was in evidence.

I read for the benefit of the referee into the record the paragraphs that I thought, of the lease, that should be carefully considered—the rights that we have, and they appear on page 125 of the transcript where, immediately after the admission I made this statement: page 125, line 13:

“Mr. Cahill: I might call the attention of the Court to the fact that the lease contains 21 paragraphs and that there are one or two paragraphs which are extremely pertinent to the matter under discussion, one of which is Paragraph 13, composed of two sentences entitled ‘Uses of Premises by Lessors.’

“The lessors and each of them shall have the right to gauge all production hereunder and to use the surface of the demised premises, (where they have the right now to use the same, respectively), for any purpose or purposes not [103] inconsistent with the rights of the Lessee hereunder, and to such an extent as will not unreasonably interfere with such rights of the Lessee hereunder, including the right to develop or to cause to be developed any sand or zone in the demised premises, the right to develop which has been lost by the Lessee. The Lessee agrees to conduct its operations hereunder so as to interfere as little with such use by the Lessors, respectively, as is consistent with the economical operation of the property for the development and production of oil, gas and other hydro carbon substances therefrom and thereon.’

We expressly reserved by that language, your Honor will note, we reserved two rights there. We reserved the right to use the surface where in using it we wouldn't interfere with the production of oil. We also reserved the right to produce from any horizon where the trustee, under the lease, had lost the right to produce.

Then Paragraph 13 was quoted and it is entitled: “Forfeiture” and is as follows:

“In the event of any breach of any of the covenants, terms, or conditions of this lease by the lessee, other than one of those mentioned in [104] Paragraph 29 hereof, and the failure of the lessee to commence in good faith to remedy the same within thirty days after written notice from the owner or owners of the demised premises so to do, or if the lessee shall fail to diligently prosecute its efforts until such de-

fault has been fully remedied, then, at the option of such owner or owners, this lease shall forthwith cease and determine, and all rights of the lessee herein and hereunder shall be at an end; provided, however, that notwithstanding any such forfeiture of this lease for any cause other than one of those mentioned in subparagraphs (a) and (b) of Paragraph 29 hereof the lessee shall have the right to retain any and all wells then being drilled or which may then be producing oil and/or gas in paying quantities, together with the aforesaid easements and appurtenances of said wells, in so far as reasonably necessary for the operation thereof, and sufficient land surrounding each well for the operation thereof. The land so retained shall be subject to all of the terms and conditions of this lease,"

And I said finally:

"I also wish to refer your Honor to the clause with reference to the surrender of the premises which is Paragraph 21, reading as follows: [105]

"Upon the expiration of this lease or its sooner termination in whole or in part, the lessee shall surrender the (163) possession of the demised premises or the affected portion thereof to the lessors, and shall deliver or cause to be delivered to the lessors a good and sufficient reconveyance thereof. Within thirty days after such expiration or termination, the lease shall, (subject to the rights and privileges granted the lessee and the lessors, respectively hereunder) remove from such premises as to which this lease is so terminated, all of its rigs, machinery and other property, and shall fill all sump holes and other excavations made by it.

"Right to quit claim.

"At any time after the lessee has drilled the first or any subsequent well upon said demised premises to the depth required by Paragraph 3 hereof, if such well or wells be incapable of production in paying quantities, the lessee may quit claim the demised premises, or the parcel thereof upon which such well may have been drilled to the lessors, and thereafter the obligations of the lessee hereunder shall cease as to the premises or parcel so quit claimed; provided further, however, [106] that the quit claiming of either of said parcels without the other shall have the same effect and be accompanied by the same results as if the same had been forfeited under Paragraph 15 hereof, but the quit claiming of the entire premises, whether accomplished by one or two deeds and whether accomplished at the same or different times, shall operate to deprive the lessee of all of its rights hereunder, except the right to remove its equipment as provided in Paragraph 14 hereof, subject to the rights of the owner or owners as in said last mentioned paragraph set forth."

I also set forth for the benefit of the referee, Paragraph 29, because it had been referred to, but actually what is in there was of no importance and it was only for the purpose of showing him the condition was no more important so he would know that without going through the entire lease.

Now, in reference to the price increases. We have just a little bit of expert testimony from the auditor at page 225, line 13. The question was asked at line 12, page 225:

"Q. And why is it higher?"

That is referring to the total oil income.

"A. There have been two price increases this [107] year.

"Q. And this is only from the 6-acre parcel?

"A. Yes, sir."

As a matter of fact the record discloses, as I have shown to your Honor, there had been a total of four price increases in a period, as I remember, of a little over a total of 12 months.

Now, there was a statement made by counsel this morning for the Security Bank. It was almost in the nature of argument and I am sure should have been considered as evidence, in reference to the debtor's plan of reorganization and as he saw it there was evidence presented to the referee that showed quite a different picture and the only evidence that I recall on that point—

The Court: Does this record show that the increase in price of oil now is as compared with the price of oil at the time the referee made this order of sale?

Mr. Cahill: I don't think it clearly shows that, your Honor, no. I still say—

The Court: We have heard evidence that there was an increase in the price of oil at different times. Has there been any appreciable amount or any amount that would aggregate what I might say would be a substantial amount as compared with the oil sales. Will you look that up while we take a recess. We will recess for ten minutes. [108]

(Short recess.)

The Court: May I suggest to counsel, that I might be able to save you a good deal of time if you will call my attention to the various points you have in mind. Of course, I have to go through this record also. It may save time.

If all the attorneys involved here go through this transcript as you are we might be here for another week. I don't want to cut you off, but if you can call my attention in a brief way to what this witness or that witness testified to, it will probably save time, because in any event I am going to have to go through this transcript.

Mr. Cahill: I did not understand that or I would have shortened it.

The Court: You appreciate that if I don't do that and the other counsel proceed as you are we will be here for a week going over this transcript.

Mr. Cahill: Yes.

The Court: I have got to read this evidence. I have got to investigate this record made before the referee.

Mr. Cahill: That being true, I can terminate almost immediately, your Honor.

I would like, however, to answer your Honor's question as to the increase in the price of oil in dollars and cents. I direct your Honor's attention first to the fact that I asked Mr. Metcalf this morning whether the figures [109] that appeared on a statement which he had in the courtroom at the time of the hearing before the referee, showing it was prepared by his office, showing the price increases from April 1, 1946 through and including July 1, 1947, were true and correct, and he said if they were set forth thereon they were undoubtedly true. And then he was asked if there was a price increase subsequent to December 1, 1947 and he answered that there was but he didn't know the amount.

I have made inquiry since and apparently that increase was a 25-cent per barrel average increase.

However, during the recess I asked Mr. Newport to telephone Mr. Gribble, who is the auditor, and to get the figures as nearly correct as he could. I asked him to give us the figure in April of the price per barrel for our average gravity oil or approximate average and he has given us the figure for 20 gravity oil. I am informed we have some wells producing a gravity oil a little higher and a little lower. Our auditor figures that as of April, 1946, for that gravity oil, \$1.06 per barrel. The price today is \$2.19 per barrel or an increase of \$1.13 per barrel. Something over 100 per cent.

The Court: All right.

Mr. Iverson: Do you know what it was for December 1, when we had the hearing before the referee?

Mr. Cahill: It would be approximately \$2.19 less 25 [110] cents or \$1.94.

I think there was some mention at that time that that was the figure but these are the figures for today.

So, that being the situation as indicated by your Honor, that you propose to read the transcript, I will state to your Honor that I have pointed out, I think, sufficient in the transcript to indicate to your Honor that my belief that our objections were proven should be sustained, including, I want to state, any reference that I have made to the trustee here, Mr. Metcalf. Particularly references that have been made to advertising and failure to do certain advertising and so forth. That carries no criticism in any manner directly or indirectly on my part or on the part of my clients to Mr. Metcalf. I think we have a very fine trustee. It is a matter within his discrimination whether he should advertise or not. We feel if there had been the extensive advertising for this sale as there was

two years before that with the 100 per cent increase in oil that something quite worth while might have happened. [111]

It is true, I might state also that I have no law to present to your Honor, but it is true there is a case—I think it is a Circuit Court decision—it is the often-cited Lake Champlain Pulp & Paper Corporation case where it says these sales should not be confirmed if there is evidence of insufficient advertising or where the public is not properly notified. That case is reported in 20 Fed. (2d) 425.

I will state also that as to the matter of the Referee without any evidence before him at all to justify it, of the trustee having actually employed a broker and ordered a broker's commission, and paying it without any evidence before him, the Referee, to justify it at all, without actually the Trustee ever having employed the broker, we have, if nothing else, a code section in this State, Section 1624 of our Civil Code which says that any agreement for the employment of a broker, the paying of commissions for the sale of real estate is invalid unless done in writing. There was nothing in writing and there was nothing submitted in writing.

The Court: It is your contention that the Referee is the one who secured the services of the broker?

Mr. Cahill: Yes, Your Honor. Your Honor might make a note of the code section. It is 1624 of the Civil Code. It is very positive. It uses those words "invalid for the payment of real estate brokers' commissions."

The Court: All right. [112]

Mr. Cahill: Thank you very much, Your Honor.

Mr. Lynch: Do you want to add anything, Mr. Nelson?

Mr. Nelson: (No response.)

Mr. Lynch: If the court please, on behalf of the trustee, I will be very brief indeed.

This court has already indicated that it intends to read this transcript and I assume will also read the findings of fact made by the Referee and examine the exhibits.

I just want to point out one thing. It is not my purpose and I think it would be inappropriate for me to discuss what weight the court is going to give to the changed circumstances and the testimony of the trustee regarding the changed circumstances.

The Court: But the trustee appears in court and seems to indicate that he wants another opportunity to settle this matter after the order has been made. Do you think it would be advisable to set aside this order of sale and give him another opportunity? He comes here and testifies to what his position is. By reason of changed conditions he says it would not be advisable to confirm this sale. Now, I am wondering what sort of situation the trustee is in before this court. It is an unusual thing. It is an unusual situation.

Mr. Lynch: It definitely is unusual. [113]

The Court: Yes.

Mr. Lynch: No question about that. The sale, the order confirming the sale by the Referee in my judgment and opinion, was proper under the facts and circumstances as then known and as they existed and the trustee in recommending that sale acted in entire good faith.

The Court: There is no doubt about that.

Mr. Lynch: He believed that that was the best offer that he could obtain. It certainly was the best offer that he had been able to obtain.

I might add at this point in reference to the advertising, that there was extensive advertising done in 1946, both in local papers and in eastern papers and in Oregon, Portland and Seattle.

It was the judgment of the trustee that further advertising would be useless so instead of putting in additional newspaper advertisements and spending money of the estate in that behalf, he notified many brokers of the fact that he still had this property for sale and it was re-offered and urged the sale of it and was anxious to sell it.

I think his testimony was that he notified some 500 brokers. But in any event the law does not require—there is no statute requiring any notice or any advertising. It is a question for the court to determine whether, under all of the circumstances, the trustee has used good judgment and [114] has done his very best to obtain for the estate the best offer.

Now, I think when the court examines this transcript he will be convinced that what the trustee did was all that could be expected under the circumstances—that he endeavored to the very best of his ability to find a purchaser for this property at a price that would be adequate and fair to all the parties concerned.

Now, there are circumstances that have arisen since that sale that, looking backward, make it appear that the sale was inadvisable.

Now, until this court makes its order finally confirming the sale of course it is open. And what weight the court is going to give to those facts and circumstances that have arisen since I don't think it is appropriate for me to discuss.

The Court: Are there any authorities dwelling upon the authority of this court in considering an order of sale of the Referee, where facts are received since the order of sale that it would be to the best interests of the creditors to order another sale.

Mr. Lynch: No.

The Court: Has this court the right to go outside of the record, or is this court bound by that record made before the Referee and none other? That is what I want to get your [115] idea about.

Mr. Lynch: It is my idea that this court is not bound by that record if circumstances have developed which would, in the judgment of the court, make it inadvisable because the matter is still pending until the final order. But it is incumbent upon the reviewing party to show error.

The Court: Well, is it error if the Referee did what he thought was proper with the record before him, but since he made the order is this court confined solely to the error or to facts developed which show the creditors could obtain more for the property now than at the time of the order of sale?

Mr. Lynch: No. In my judgment there are two things the court may consider. First, was there any error? The burden then is upon the reviewing party to establish that error. The record is complete. The court has the benefit of the transcript and I am satisfied after an examination of this transcript it will disclose there was no error.

Now, I further believe that if there are facts that convince this court that what has arisen between the time that the sale was ordered by the Referee and the present time, if the court is convinced that those facts disclose

that the estate will suffer by confirming the sale, that it has the right to set aside the sale. Whether or not the court has sufficient facts, evidence on which to base such a conclusion [116] I am not prepared to say. But as far as the Trustee is concerned we will submit it on the record.

Just one additional point I intended to mention and that is this. As far as the commission to the broker is concerned I don't believe that a determination of fact, or if this court—I will put it this way: If this court should determine upon the record that the allowance of a commission was improper under the circumstances as disclosed by the record, that would not affect the sale. The only effect is the broker's right to the commission.

Mr. Iverson: If it please the court—

The Court: It is charged against the estate, isn't it? That commission is charged as an expense to the estate.

Mr. Lynch: But it doesn't affect the validity of the sale whether or not this court would have the discretion to disallow that particular item.

The Court: I see your point.

Mr. Iverson: If it please the court, this proceeding today really has come down to two main points. First of all, were there facts since the hearing on December 1st which would justify a different order being entered now than on December 1st? And second, is the record sufficient to justify the order having been made at that time?

Mr. Metcalf said that he had had a change of opinion this morning because of facts that had happened since [117] December 1st. His change of opinion was based on two main things as I summarize his testimony.

First, he said that he thought that he might be able to get an offer for the sale of this property, the surface and oil rights together, at a higher figure. And, second, there has been such an increase in the value of, or in the sale price of oil as to change his opinion as to what the value of the property was.

Well, we have just heard what the increase since December 1st was. As a matter of fact, at the hearing on December 1st the sale price of oil as of that time, was gone into and it was pointed out to the Referee that there had been increases in the sale price of oil up to that time.

There has only been a 25-cent a barrel increase since the December 1st hearing, which, of course, is only about ten per cent.

Now, as to the other figures and, by the way as pointed out this morning, this trustee in bankruptcy is still in position to receive those oil payments even if this sale is made. This is merely a sale of the surface rights to Procter & Gamble and we retain our rights under that oil lease—that is, the trustee does so. It will still retain and get those oil payments.

Now, as to the second point that the trustee made that he thought he could make a sale for a larger sum of money than [118] this, I might point out to this court, and you will find it in the record, that this property has been sold on two different occasions.

First of all, a sale was made to Procter & Gamble and then—I have forgotten the figure, but it was approximately \$190,000. Then that sale was not confirmed and there was an attempted sale to the Los Angeles Soap Company, wasn't there?

Mr. Lynch: Never a return made on the original Procter & Gamble order. Before we made such a return

we got in a higher offer from the Los Angeles Soap Company and the return was made on that and that was withdrawn.

Mr. Iverson: Then the proposed sale to the Los Angeles Soap Company and that sale fell through. It was at approximately the same figure. And then Procter & Gamble came in and bid a lesser figure than the \$198,000 that it eventually sold for and the trustee refused to submit the offer and eventually he told them if they would bid the price that it was confirmed that he would submit it and it was submitted and the bid was raised to that price and the bid was submitted and approved.

Now, as I pointed out to this court this morning, this matter has been before the Federal Court for over 13 years. It is reputed to be the longest bankruptcy case in any bankruptcy court in the United States. And as I stated [119] this morning every time we come to the point where we can liquidate the assets immediately comes up this statement that there is going to be someone who is going to buy it for more; we are going to refinance it and if the court will read the record you will see that there have been at least four or five refinancing schemes and at the time we had the hearing on December 1st they came in and tried to deter the Referee from approving the sale because they said that an insurance company was going to loan four or five hundred thousand dollars to them to refinance it. And they even had one real estate man come in and say that he had only heard about this property being up for sale the preceding day, and that if given 90 days he felt he could sell the property for \$60,000 an acre, which would be \$360,000, approximately. But those 90 days have run now since December 1st and where is their sale? They still don't have a definite offer. Nor

does Mr. Metcalf now have a definite offer from anyone for any price in excess of this figure. And if this sale is not approved at this time it means that we will go on again for years, probably, before we get any more liquidation, and if we have another sale of any substantial asset in this estate we will have exactly the same thing to go through as we have done for four or five times before, as the record shows.

And if this court will read the statement of the Referee on page 223 of this transcript, in his summary, he will note [120] that he says this:

“I have been hearing that so long—” this is about the sales and the refinancing—“that I would like to see something actually happen. I have been hearing refinancing ever since I got this case two years ago. We just need to sell some property. Quit sitting on your hands and get around and sell some. Isn’t it true that anything in the world you have to sell is worth what you can get for it?”

That is the way the Referee expressed himself.

Now, it seems to me then we should come back to the point: Was the Referee on December 1st, justified in approving the sale?

Mr. Cahill has pointed out the opinions of some of the so-called experts produced as to the value of the property, but I wish to point out the one expert or the one man whom we called an expert, Mr. Tom Mason, who appraised the property at \$196,350.

Now, on Page 104 of the transcript the Referee stated that in his opinion the man was fully qualified to appraise the property. And at one time he expressed his opinion that he was relying on the appraisal of Mr. Mason because he thought he knew more about it than anyone else who was brought before the court.

He appraised it at less than the sale price that [121] was actually obtained.

There has been quite a point made here that if this sale is completed it would be possible for Procter & Gamble to, you might call it, conspire with the Universal-Consolidated Oil Company to have them give up their lease and make a new lease under which the trustee interest in the oil would terminate.

There has been an offer of stipulation made on the part of Procter & Gamble which would obviate that and that situation, Your Honor, would only come about if there were such a conspiracy to deprive the bankrupt estate of its property rights. And if that situation arose it seems to me offhand, that this trustee would be able to go in and set aside any such termination of its rights in the property.

There has been quite a point made here, as there was at the hearing on December 1st, that there is oil below the present zones which hasn't yet been touched.

I refer this court to page 159, line 6 of the transcript, where Mr. Follansbee, the vice president of the Universal-Consolidated Oil Company stated that at great expense the Universal-Consolidated Oil Company had deepened their No. 6 well to the Ford zone. They found oil in sands there but not in what they considered to be producing oil, that would justify the production of oil from those sands.

He also stated on page 171, line 8 of the transcript, [122] that in his opinion there was no oil sufficient for production in the lower zone, the 237 zone.

Mr. McCraney: If Your Honor please, I would like to close with just a few remarks on behalf of the company that is attempting to complete this purchase.

As I stated this morning, the thing that we want is a piece of the surface property down there. We are not in the oil business and we are not interested in getting into it. We think that the price is fair. We have raised the price once at the request of the trustee. We believe that we have gone along as far as is necessary with any concessions that have been asked of us.

I think that the evidence taken at the hearing shows that the Referee is properly supported in what he did.

There is only the further question as to the effect of the trustee's change of heart in the face of circumstances that have taken place since that time.

I am not going to stand here and tell this court that it can't prevent the trustee from making an improvement sale and is limited simply to the evidence that was taken at the hearing. I think the court can always come in and keep a bankrupt estate from doing something to its detriment. But I think the court should consider a little bit just how much we have in the way of circumstances that have arisen since December 1st. [123]

There is a rise in the price of oil. There has been a certain amount of talk among the people that the trustee talked to about the possibility of selling this whole thing for a lot of money.

In view of the fact that the company will have to make substantial income tax payments there is a lot of question in my mind as to whether they will make a lot more money on this piece of property out of such a sale than they will make if they go ahead and take our offer and take our \$198,000.

I think perhaps we should avoid being led into the error of assuming that merely because the trustee has become a little more cautious in the face of these circumstances

that there is necessarily something real that is going to happen here.

The most unfortunate thing that could happen would be for the court to refuse to confirm this sale on the basis of these rumors and speculations and then have it turn out that there was nothing really substantial to them; that the bankrupt estate could not make a sale and then we would be right back where we were before. From the point of view of my client we wouldn't have the piece of property, and from the point of view of the bankrupt they wouldn't have the money.

As I said this morning we are willing to go all the [124] way in entering into any kind of an agreement or stipulation within reason, to preserve the interests of the bankrupt estate.

I believe we have already disposed of the problem that was raised and perhaps seriously and perhaps not, that Procter & Gamble might slip through the back door and buy out the interests of the operating company. We are willing to make any agreement that will prevent that.

Now, the further objection that has been raised is the possibility that Universal and the operating company for some reason of its own, may quitclaim tomorrow, pull out all their equipment, quitclaim to Procter & Gamble and leave the trustee in bankruptcy without any of the oil royalties that he is now enjoying from that property.

The Court: Is it likely they will do so with the price of oil increasing?

Mr. McCraney: My reaction would be that Universal will probably be in there just as long as they can profitably get another drop of oil out of the property. That is speculation and I don't know about it, but we are still

willing to make any stipulation that we will protect as far as possible, the trustee in bankruptcy against that sort of thing happening.

Now, I think it would be appropriate since I am addressing counsel as well as the court in this matter, for me [125] to state the limits beyond which we probably would not go in agreeing to further conditions of sale.

We would not agree, I don't believe, that beyond 1963 when the lease terminates, that anyone else beside Procter & Gamble should have the oil rights. We think 15 years is long enough to work out anything. And that is one basic position we take. We don't want to give away oil rights beyond 1963.

Any method that was worked out would have to afford us some substantial access to the surface because after all that is what we are paying our \$198,000 for.

Frankly we think that eventually Universal may quit drilling on part of this thing and we will get to use part of it. We won't pay \$198,000 for a ball park and a parking area, which is all we are getting, if Universal actually goes ahead and operates under the lease for a full 15 years.

The Court: What are you buying under your bid?

Mr. McCraney: We are buying the entire property except that we can't use a substantial part of the surface until Universal stops drilling and we can't get the oil rights until after they are through.

The Court: You say a substantial part. What part of the property can you use?

Mr. McCraney: It is my understanding, and I am not too [126] well up on the facts, that most of the property cannot be used at the present time because of the equipment that is located on the property. But the trustee,

under the terms of this sale, is going to clear away enough of the surface that we can use it to put in parking lot, which I can understand is necessary, and they want a baseball field which would seem to be secondary and our use will generally be limited to that for the time being. Is that correct, Mr. Lynch?

Mr. Lynch: That is correct.

Mr. McCraney: We are paying quite a lot of money for something we may not get the beneficial use of for a long time. We are willing to do this and it may not work, but I think it will obviate the objection that has been made that the trustee might lose everything if Universal gave up tomorrow. We are willing to agree that as to any portions of the property that Universal quitclaim, whether it is the entire property or simply a portion of it, that if the trustee can work out some method of sub-surface drilling that we will agree that they may retain the oil rights fifty feet below the surface for the full period until 1963. In other words, if they can drill by slant drilling they can keep on getting these royalties or operations of their own until 1963.

Now, maybe the objector will come up with the [127] objection that slant drilling isn't practical. I don't know. Maybe it wouldn't work there but that is one step further toward obviating this objection that may be the trustee will lose everything if Universal gives up.

The Court: I was wondering what you are going to use this property for under your bid.

Mr. McCraney: Eventually we are going to use it for storage facilities, warehouses, dock space and other operations in connection with the rather large manufacturing plant that we have right near there at the present time and we are willing to gamble that sometime during the

course of the next 15 years part of that surface will become available to us.

We are willing to gamble further that if Universal drills there and keeps right on for 15 years that after 15 years we will get the use of the property. So, I think in the light of those facts our bid of \$198,000 doesn't sound quite as low as it does when people talk about our getting all this oil and everything else during that time.

Now, I can only say that, if the court feels that this is an improvident sale, we are willing to entertain any reasonable modification of the order that will protect the rights of the trustee in bankruptcy up to the point where it actually means that we don't get any assurance of the beneficial use of the property for 15 years and in that case we simply couldn't accede to it. But our attitude is still one of cooperation in an attempt to make the sale go through rather [128] than be attempting to stand on any technical position that we might be able to take here.

The Court: Is there anything further?

Mr. Cahill: I might just make this one observation, if your Honor please. This is a court of bankruptcy and therefore the United States Supreme Court has said, comparatively recently—several times recently, first, in a case called *Local Loan Company vs. Hunt*, somewhere around 309 U. S., that all proceedings herein are proceedings in equity. All decrees in the United States Supreme Court are decrees in equity and as such I reason when a trustee in bankruptcy appears before this court as a court of equity, and in a proceeding in equity, and states that he did as he did this morning—that is, if he had the knowledge now, not only in reference to higher prices, not only in reference to an increase in the price of oil, but if he had the knowledge that he says that he has now, that royalty buyers will not pay the same price

or anywhere near the same price for royalties where they are divorced from the ownership of the oil itself, as would happen if this sale is confirmed, that he would not have recommended to this court this proposed sale because of the conditions.

Now, what is the significance of that, your Honor? The significance is this. The trustee comes here under oath, confesses that he made a mistake. He made a mistake [129] because of the lack of knowledge which he now has, particularly on this last point I mentioned. And as such he asks this court, as we do, not to confirm an order which he fears, as he has expressly stated, will tend to greatly injure this estate and the creditors thereof.

Mr. Nelson and myself represent well over 70 per cent of the creditors.

The bankrupt, whose only hope can be either a sale such as suggested by Mr. Metcalf, who says now that for the first time there is such a sale available—we might call it a master sale, a gross sale of both land and oil.

The bankrupt appears also and objects.

Your Honor has been addressed several times on the fact that any fear of conspiracy is averted by the offer which the purchaser now is pleased to make as an amendment to his offer. But, as I pointed out before and I must point out again, if that could eliminate the termination of this lease by the lessee, all right; but it cannot in the history of the Los Angeles Basin.

One of the experts testified concerning—I think it was Mr. Carrey, that over and over again the original producer, usually a major oil company, found because of the 35 per cent royalty or the 40 per cent royalty and so on down, that there is as high as 80 per cent of them that could no longer profitably produce the lease and they

quitclaimed and [130] the landowner goes right in and he produces successfully either through himself, or he leases it to a smaller company for a lower royalty or something of that kind. This estate has a very, very valuable right in minerals now in place which we are asked by this particular offer to jeopardize and the proposed purchaser, unfortunately—and it is clear we have the good will of the proposed purchaser, but unfortunately he has no power to prevent that thing happening.

There might be a gross error of judgment on the part of the oil company that might arise from 101 sources, but whatever source it arises from this estate is going to be seriously, as the trustee told your Honor this morning, injured. So, for those considerations and because of those reasons we feel the sale should be rejected in its entirety. We feel the court has that power and certainly after the trustee comes in here and takes the stand and says he made a mistake. I asked him the direct question and he said if he knew then what he knows now he would not have recommended the sale. Then I said,

“Mr. Metcalf, do you recommend to this court now that the sale be not confirmed?”

And he said:

“I certainly do.”

Under those circumstances we think, if your Honor [131] please, this matter should go back to the trustee. He is at all times under the jurisdiction of this court. I am speaking of the trustee. He is subject to be hauled into court for examination at any time by any of the parties.

If the trustee is successful in accomplishing what he has in mind, the gross sale of land and oil it will be of benefit to everyone. If he doesn't the property then should be offered for sale, readvertised, re-appraised, and a sale should then be held on that basis. It would be held, certainly, on a much more favorable market than the market that was available in December, 1945, which was the identical amount almost to the penny which was never confirmed and never got to the confirmation point simply because the purchaser elected to withdraw and walked into court and said that he withdrew his offer, because of their discovery that the cost of the removal of some equipment—As I recall they were going to pay for the cost of the removal of the equipment and after it was removed it wouldn't have given them all the free land that they wanted.

So that is my request of your Honor. I thank you very kindly for your very close attention.

Mr. Lynch: If the court please, I have just one observation to make. There has been the suggestion or intimation that the trustee made a mistake because he didn't understand the implication or effect of this sale. I will very briefly [132] call the court's attention to the record at page 91:

"Mr. Lynch: When the lease terminates for any reason—by virtue of time or failure to produce in commercial quantities—and under those circumstances it is quitclaimed back by Universal-Consolidated Oil, the rights of the trustee in this estate cease. There is no dispute on that.

"By Mr. Cahill:

"Q. That is the fact. That being the fact, what, in your opinion, is the danger of the trustee in bankruptcy in selling this asset in this manner?

"A. He would lose the protection that would run to the landowner in the event the lease was terminated.

"Mr. Lynch: There is no question about that.

"The Witness: Therefore, the value would be lower.

"By Mr. Cahill:

"Q. Because of that factor is it true that those who would purchase, and that a sale not having been made—the proposed sale—the interest in the oil from the trustee, will they pay, in your opinion, a lesser figure if the sale is consummated on that basis?

"Mr. Lynch: No sale involved. What we get for [133] the oil is fixed by the terms of the lease. We get a certain percentage. The lease provides that will be sold at market. The question of whether we sell this property does not affect the price we get for the oil."

Then again on page 94:

"By Mr. Lynch:

"Q. What you mean is if this sale goes through this estate's royalty interest would be less valuable because it carried only with it the right to produce under this particular lease?

"A. That is exactly what I mean.

"Q. In other words, if the sale is made and the rights of any future development are taken away, then this protection under this particular lease has

less value than it would if it carried with it future production?

"A. That is true, anyone that bought this royalty today before the sale would have no rights to any future development.

"Q. He would have only rights under this lease, and without that lease he would have no right in any other lease on the land?

"A. That is correct.

"Mr. Lynch: That is something that has been [134] conceded all along."

In other words, there was no misapprehension or misunderstanding as to the effect of this sale.

Mr. Cahill: May it be stipulated that was not the testimony of Mr. Metcalf, but the testimony of Mr. Roy G. Mead?

Mr. Lynch: That is right.

Mr. Cahill: Thank you.

Mr. Lynch: But Mr. Metcalf was in court at the time and I was his counsel and there wasn't any misunderstanding.

The Court: We have a situation here where the bankruptcy proceeding was instituted in 1935 and it has been pending in this court since then.

During all those years the parties in interest, the creditors, the trustee and the Referee have been given an opportunity to bring this case to a close. In other words, you are creating an atmosphere of speculation by continually asking for further time during which you might acquire a better bid or more money for the property. It is doubtful whether there would ever be an end to that kind of proceeding in a bankruptcy court or in

any other court, if we are to sit here and entertain an atmosphere of speculation on the sale of property and hold creditors up as we are doing here.

I haven't made up my mind as to whether this sale [135] should be confirmed or set aside yet from this record that is before the Referee and also from this additional testimony of the trustee who now comes in and says if the court will give him another chance he feels somewhat persuaded that he can receive more money for this property in the interest of the creditors.

They are the ones that he is representing primarily. They are the ones that the Bankruptcy Court is representing primarily. First, it is the creditors of the bankrupt and then if there is anything left, of course, it goes to the bankrupt. But he is a secondary consideration. When he comes into a bankruptcy court his creditors have to be taken care of first.

The thought has occurred to me that if the court would hold up passing on this order of sale until a certain time and if between now and that time the trustee can receive an offer of purchase for this property in any amount in excess of or a substantial amount then the court can consider that in addition to the record that is before the Referee.

I am not saying that the record before the Referee isn't a correct one, but we can consider them both by giving them an additional chance, which they are appealing here for on the basis that the increase in the price of oil will make a better sale possible. [136]

I shall not permit this case to run on indefinitely. That must be done in a specified time or this thing will be brought to a final close.

The thought occurs to me whether I should, since the trustee has come here and asked that this sale be

set aside by reason of subsequent developments by which the chances are the estate will acquire more out of it for the benefit of the creditors, whether I should give him time to do that—see if that can be worked out and then pass finally upon this bid. I am wondering whether I should hold this in abeyance. If I do that would certainly give the trustee and the creditors and the objectors their opportunity to get more out of this property than what they are getting out of it under this bid. But for me to set aside this order of sale and send this back and leave it open to the trustee I don't feel I would be justified in doing until this contingency which has been presented here by the trustee under oath, of his feeling that he can get more for this property by reason of the subsequent developments is given a chance. In other words, we want to get all we can out of this property for these creditors.

Now, the bank comes in here and says by reason of this sale they will cut their claim down to \$150,000. How about these other creditors? Maybe they are not able to do that. They are interested in this just the same as the [137] bank who says they are willing to take a reduction of \$150,000 if I confirm this sale. How about these other creditors? They have rights, too. They are all equal.

The thought occurred to me that it might be equitable and just to give this trustee—just hold this in abeyance, my ruling on this order of sale, until a certain time, and if he can receive bids or make any report to the court of any amount greater than what he now has, under all the circumstances, the court can then pass on whether to set aside the sale or confirm the order of the Referee.

The trustee seems to feel he can get \$500,000 or \$700,000 more for this property over and above the \$198,000, from which you have got to deduct about \$20,000 for expenses and other items which brings it down to about \$140,000 as all the estate will get out of this \$198,000 bid. That is what this record discloses.

Now, it is a question of whether this court shouldn't, comparing that \$140,000 which they will get out of it, against the opportunity which the trustee says he feels will provide an amount somewhere between five and seven hundred thousand dollars—whether the court shouldn't give him that opportunity within a reasonable time or not. That is what confronts me mathematically in this case.

There isn't any dispute on the record. That is the mathematics of it. But he wants the chance. [138]

If this is true, as the trustee feels, he can receive a bid for this property in a reasonably short time. I think that time should be limited and following that the court can pass on the matter.

That is the thought that is running through my mind if I am going to treat these creditors equitably and protect their rights under the law. Suppose I postpone the final determination of the objections to this sale of the Referee until about the 25th of April and then we will have the whole thing before me and I can dispose of it finally.

If the trustee has any confidence in his ability to secure a bid he can certainly get it between now and the 25th of April and make a report to this court.

I am going to read this record between now and then, even though I have a pretty good idea of what it is already. Following that we can then dispose of the matter.

I will postpone the passing on these objections to the sale until the 25th of April, and the trustee may have authority to see if he can get further bids on this property and the conditions surrounding them. Following that I shall determine whether to confirm or set aside this order.

Mr. Lynch: May that be returnable before this court on the 25th of April with the usual deposit of ten per cent of the bid?

The Court: Yes, certainly. [139]

Now, as to the commission allowed the broker. I want you to look up the law on that. I have an idea about what the law is with reference to the \$5,000. I want you to look up on the law and advise me whether a Referee can call in a broker and give him \$5,000 commission. I shall have to pass on that separately when the time comes, whether that is a legal charge. I may either refuse to confirm that or allow it. I don't know at this time. There is a legal question presented there as to whether or not that was regularly received and was a legal charge against this estate—that is the manner in which it was ordered to be paid.

I think this is the proper way for me to handle this case, gentlemen, considering the shape it is in. That will give you all an opportunity between now and the

25th of April to dispose of the matter one way or the other.

It is the order of the court that this case will be postponed until April 26th, 1948, at 10:00 o'clock a.m. Counsel for the trustee will prepare a written order postponing this until then.

Mr. Lynch: Very well, your Honor.

(Whereupon, at 4:30 o'clock p.m., the above entitled matter was concluded.)

[Endorsed]: Filed Jun. 11, 1948. Edmund L. Smith, Clerk. [140]

[Endorsed]: No. 11962. United States Circuit Court of Appeals for the Ninth Circuit. Proctor & Gamble Manufacturing Co., Appellant, vs. H. F. Metcalf, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., Bankrupt, Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene P. Clark, F. P. Newport Corporation, Ltd., Ruby E. Neblett, Security-First National Bank of Los Angeles and Joseph Sattler, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 1, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 11962

PROCTER & GAMBLE MANUFACTURING CO.

vs.

H. F. METCALF, et al.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant, Procter & Gamble Manufacturing Co., hereby designates the following as the points on which it intends to rely on appeal to the Circuit Court of Appeals for the Ninth Circuit pursuant to its notice of appeal filed on May 25, 1948.

1. The District Court erred in rendering or entering the Order or Orders appealed from.
2. The Order or Orders appealed from are not supported by adequate, or any, findings.
3. In so far as findings were made by the reviewing court, such findings are not supported by and are contrary to the evidence and are clearly erroneous.
4. The reviewing court disregarded the rule that the findings of a Referee in Bankruptcy are presumptively correct.
5. It was an abuse of discretion for the reviewing court to deny a continuance on March 11, 1948.

O'MELVENY & MYERS
PIERCE WORKS
RICHARD C. BERGEN
HOWARD J. DEARDS
By Howard J. Deards

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 16, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

PETITION FOR ORDER RE EXHIBITS
AND ORDER

Petitioner, Procter & Gamble Manufacturing Co., represents to the above-entitled Court:

1. On or about June 28, 1948, the District Court of the United States, Southern District of California, Central Division, made a certain Order pursuant to which the Clerk of said Court forwarded to the above-entitled Court certain original exhibits, in lieu of copies thereof, as part of the record on the appeal of Petitioner to the above-entitled Court.

2. Said exhibits are a necessary part of the record on appeal but should be considered by the Court in their original form and should not be required to be printed as a part of the printed record on appeal by reason of the following:

(a) The printing of said exhibits would unreasonably and unnecessarily increase the expense of said appeal, which expense should be kept at a minimum because said appeal is from an order in a bankruptcy matter.

(b) Said exhibits in their original form may be referred to by the Court as readily and more usefully than could printed copies thereof.

Wherefore, Petitioner Prays that the above-entitled Court make its Order that said original exhibits be not

printed as part of the printed record on appeal, but be considered by the Court in their original form.

Dated this 15th day of July, 1948.

O'MELVENY & MYERS
PIERCE WORKS
RICHARD C. BERGEN
HOWARD J. DEARDS

By Howard J. Deards

ORDER

Good cause appearing therefor from the foregoing Petition of Procter & Gamble Manufacturing Co.:

It Is Hereby Ordered that the original exhibits constituting a portion of the record certified by the Clerk of the District Court on the appeal of Procter & Gamble Manufacturing Co., be not printed as a portion of the printed record on appeal, but be considered by this Court on said appeal in their original form.

Dated this 16th day of July, 1948.

FRANCIS A. GARRECHT

Circuit Judge

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 16, 1948. Paul P. O'Brien,
Clerk.



Case No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

Appellant,

vs.

H. F. METCALF, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

O'MELVENY & MYERS,

PIERCE WORKS,

RICHARD C. BERGEN,

HOWARD J. DEARDS,

900 Title Insurance Building, Los Angeles 13,

Attorneys for Appellant Procter & Gamble Manufacturing Co.

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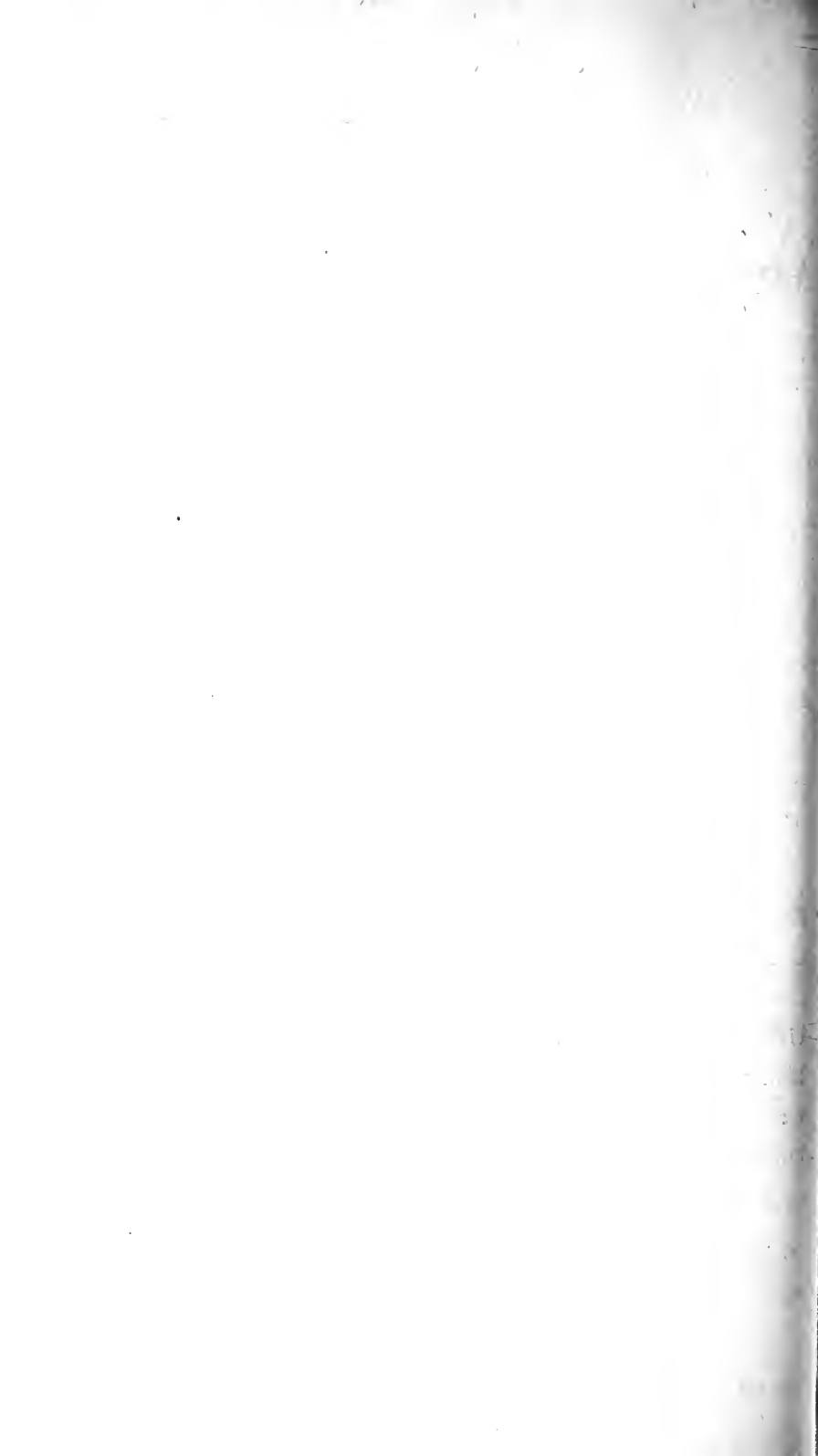
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Case No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

Appellant,

vs.

H. F. METCALF, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTION.

A. Jurisdiction of the District Court and of Referee Hugh L. Dickson.

The jurisdiction of the District Court of the United States for the Southern District of California, Central Division, is predicated upon 11 U. S. C. A. 1(10) and 11 U. S. C. A. 11, and upon the following pleadings and facts, and the jurisdiction of Hugh L. Dickson, Referee in Bankruptcy in and for the County of Los Angeles, State of California, is predicated upon 11 U. S. C. A. 66 and the following pleadings and facts:

(1) On March 19, 1935, and for the longer portion of the preceding six months, F. P. Newport Corporation,

Ltd., had its principal place of business at 106 West Sixth Street in the City of Los Angeles, County of Los Angeles, State of California, within the territorial jurisdiction of the District Court of the United States, Southern District of California, Central Division.

(2) On March 19, 1935, a Creditor's Involuntary Petition in Bankruptcy [Tr. p. 2] was filed in said District Court, wherein it was alleged, together with the jurisdictional facts, that said F. P. Newport Corporation, Ltd., was insolvent and had committed an act of bankruptcy.

(3) On January 12, 1937, said District Court made and entered an Adjudication of Bankruptcy of said F. P. Newport Corporation, Ltd., and made and entered its order of reference of said matter to E. R. Utley, Esq., one of the Referees in Bankruptcy of said District Court. [Tr. p. 5.]

(4) On February 28, 1945, said District Court made and entered an order of re-reference of said matter to Hugh L. Dickson, Esq., a duly qualified Referee in Bankruptcy in and for the County of Los Angeles, State of California. [Tr. p. 6.]

(5) On October 27, 1947, a Petition for Authority to Sell and for Confirmation of Sale of Real Property was filed with Referee Hugh L. Dickson in said matter. [Tr. p. 7.] He made his order thereon on December 19, 1947 [Tr. p. 26], and a petition to review said order was filed with the aforesaid District Court on December 29, 1947 [Tr. p. 36]. On May 10, 1948, said District

Court made its order vacating and setting aside said Referee's order [Tr. p. 91] and on May 25, 1948, appellant filed its Notice of Appeal herein [Tr. p. 95].

B. Jurisdiction of the Circuit Court of Appeals.

The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is predicated on 11 U. S. C. A. 47(a) and (b) and 11 U. S. C. A. 48(a), the fact that said matter involves more than \$500 and the foregoing pleadings and facts.

II.

STATEMENT OF THE CASE.

This is an appeal from an order of a District Court reversing, vacating and setting aside an order of a Referee in Bankruptcy confirming a sale of real property belonging to a bankrupt estate. The sole appellant is the bidder on the sale.

The case came before the Referee in Bankruptcy on a petition for authority to sell and for confirmation of sale of real property [Tr. p. 7] and objections thereto [Tr. pp. 12 and 21]. Hearings were had over a period of several days and the Referee then made his Findings of Fact, Conclusions of Law and Order confirming said sale. [Tr. p. 26.] A petition for review was filed [Tr. p. 36] and came on for hearing before Judge Cavanah sitting temporarily in Los Angeles [Tr. p. 312]. Some additional evidence was taken and the matter was then continued for six and one-half weeks to give the Trustee time

to seek a better bid. The matter then came on again for hearing and still further evidence was taken. At both hearings in the District Court, the Trustee, H. F. Metcalf, was the only witness. [Tr. p. 292.] The District Court then made its order reversing, vacating and setting aside the order of the Referee. [Tr. p. 91.]

III.

SPECIFICATION OF ERRORS.

Appellants rely on the following specifications of error. [Tr. p. 423.]

(1) That the District Court erred in rendering or entering the order or orders appealed from.

(2) The order or orders appealed from are not supported by adequate, or any, findings. [Tr. p. 91.]

(3) In so far as findings were made by the reviewing court, such findings are not supported by and are contrary to the evidence and are clearly erroneous. [Tr. p. 91.]

(4) The reviewing court disregarded the rule that the findings of a Referee in Bankruptcy are presumptively correct.

(5) It was an abuse of discretion for the reviewing court to deny a continuance on March 11, 1948. [Tr. p. 292 *et seq.*]

IV.

SUMMARY OF ARGUMENT.

The argument of appellant is that the showing made before the Referee in Bankruptcy justified his order of confirmation and that the order of the District Court reversing, vacating and setting aside the order of confirmation was clearly erroneous.

There was a conflict in the evidence presented to the Referee as to the fair value of the property. After hearing the evidence, the Referee accepted the evidence presented in support of confirmation. On the review before the District Court there was not even a suggestion of fraud, mistake or accident or even of gross inadequacy of price. The District Court merely felt that there might be some inadequacy of price and that a better deal might be worked out, and upon that ground and upon the ground of expediency, the District Court reversed, vacated and set aside the order of the Referee.

It is the position of appellant that to justify the vacating and setting aside of an order of confirmation there must be a showing of fraud, mistake or accident such as would avoid a sale between private parties, or a showing of such gross inadequacy of price as to shock the conscience of the court and to raise a presumption of fraud. In order to demonstrate that nothing of this sort was even suggested in the present case, it becomes necessary to examine the facts at some length. After examining the facts, we will turn to an examination of the law applicable to the factual situation.

V.

ARGUMENT.

A. The Facts.

1. The Bankruptcy Proceeding.

In 1935, the Security-First National Bank of Los Angeles held the legal title to the property here involved, as well as other properties, under a trust declaration securing a loan to the F. P. Newport Corporation, Ltd. The F. P. Newport Corporation, Ltd., was in default on the loan, and the Security-First National Bank instituted proceedings to foreclose the security held by it under the trust declaration. A creditor's involuntary petition in bankruptcy was filed on March 19, 1935 [Tr. p. 2], and as a result the Security-First National Bank was enjoined from prosecuting its foreclosure proceeding.

On January 12, 1935, an adjudication of bankruptcy of the F. P. Newport Corporation, Ltd., was made. [Tr. p. 5.] At that time, the bankrupt was indebted to the Security-First National Bank in an amount in excess of \$1,000,000. Concurrently with the adjudication of bankruptcy, a written agreement was entered into between the bankrupt, its receiver, and the Security-First National Bank, whereby the Security-First National Bank waived \$81,278.26 of the bankrupt's obligation and reduced the interest rate on the obligation from 6 per cent to 4 per cent. The bankrupt and its receiver agreed that the assets of the bankrupt would be liquidated and that the obligation to the Security-First National Bank would be paid in full by March 1, 1940, or that the bankrupt and the receiver would not seek to further enjoin or delay foreclosure.

Despite this agreement, the Security-First National Bank has been held off for more than twelve years in its efforts to secure payment of its secured claim either by foreclosure of its trust declaration or by liquidation of the assets of the bankrupt covered by the trust declaration. Its claim has been substantially reduced, largely by reason of the discovery of oil on real property belonging to the bankrupt estate (including the property here in question), but still exceeds \$300,000. [Tr. p. 287.] The net proceeds from the present sale, if consummated, would be applied to the balance due on that claim.

The protection of creditors is of primary importance to this court as it was to the Referee. On the question of the position of the Security-First National Bank, the testimony of R. T. Adams, an assistant vice-president of the bank, is significant. He testified that while he did not at the time of the hearing consider the loan of the bank to be in jeopardy, still:

“If we are asked to continue to speculate for the benefit of the unsecured creditors to a point definitely, the present boom will pass us by and what you can do with unproductive real estate is anybody’s guess. . . . If we can liquidate today without doubt we can get our money and the unsecured creditors perhaps get something. But that can change any minute.” [Tr. p. 289.]

It will, perhaps, be apparent from this history of the bankruptcy proceeding that the Security-First National Bank refrained from joining in this appeal not from a lack of interest therein but from a desire to keep itself free to press for foreclosure of its encumbrance upon the property of the bankrupt estate.

2. The Proposed Sale.

a. THE BACKGROUND OF THE PROPOSED SALE.

Attempts have been made over a period of several years to sell the property here in question. It was extensively advertised in 1946 at a cost of approximately \$1,000 [Tr. pp. 119, 121 and 122] and folders describing the property were sent to 500 brokers in Long Beach [Tr. p. 121]. The best unrevoked and firm offer which has ever been received for the property is the offer here in question. [See Tr. p. 315.]

b. THE TERMS AND CONDITIONS OF THE PROPOSED SALE.

The offer in question [Tr. p. 7] is an offer of \$198,000 for a 5.9906 acre tract of land situated on Channel No. 3 in Long Beach Harbor, subject to an oil and gas lease to Universal Consolidated Oil Company and reserving to the bankrupt estate all rents, royalties and other proceeds accruing under said oil and gas lease. [Tr. p. 8.] Under the terms of the oil and gas lease the lessee has prior rights to the use of all the surface except the front 150 feet, most of which is under water, and a right of way for ingress and egress to this front 150 feet. Upon the expiration, surrender or other termination of the oil and gas lease, which by its terms may run to 1963, the entire property is to vest in the purchaser. As a condition of the sale, it is provided that the Trustee shall remove certain obstructions from about $1\frac{1}{2}$ acres of the land being sold to a three-acre tract located nearby and also owned by the bankrupt estate. It is estimated by the Trustee that this removal would entail a maximum cost to the bankrupt estate of \$20,378 [Tr. p. 116] and would still leave the land being sold cluttered with oil wells and derricks, except

for the 1½ acres which appellant hopes to use for a baseball park and parking area for its employees in conjunction with its factory which is situated nearby, subject, of course, to the prior right of usage by the Universal Consolidated Oil Company until the expiration of its lease.

3. The Case Before the Referee in Bankruptcy—The Objections to the Sale and the Evidence Adduced Thereon.

A summary of the evidence adduced before the Referee on the hearing on the petition of the Trustee for confirmation [Tr. p. 7] and the objections thereto [Tr. pp. 12 and 21] is contained in the Referee's Certificate on Review [Tr. p. 49, at p. 53 *et seq.*]. It is not only an excellent summary but is a critical analysis of the testimony as well. Since it was prepared from memory by the Referee [Tr. p. 53] it clearly shows the attention given by him to the evidence as it was produced.

A number of separate objections to the sale were specified by the objectors, but most of them, whether purporting to do so or not, related to the question of the adequacy of the price. The most important of these objections will be considered seriatim.

a. THE OBJECTION THAT THE PRICE OFFERED WAS INADEQUATE.

On the question of the adequacy of the price, the first point to be noted is that the property was appraised in December 1945 at \$211,462 by Thomas J. Cunningham, an appraiser appointed by the court, and now a judge of the Superior Court of Los Angeles County.

The second point to be noted is the inability of the Trustee to obtain a higher bid during the several-year

period in which he has been pressing for the sale of this property. The Referee succinctly put it in the course of the hearing that "anything in the world you have to sell is worth what you can get for it" [Tr. p. 275] and this observation seems particularly applicable to the present controversy over the adequacy of the price.

Harry C. Higgins, H. V. Johnson, Clark C. Burgess, and H. G. Newport testified, on behalf of the objectors, to appraisals of the property at from \$359,435, or \$60,000 per acre to \$419,571 (approximately \$70,000 per acre). None of these individuals knew of any sale of comparable property at anything like the price per acre they placed upon the property, and all admitted that sales which have been made have been at approximately the proposed sale price per acre (approximately \$33,000).

Mr. Higgins testified to a sale by Southern Pacific Company, by whom he is employed, of a similar property at \$26,500 per acre. [Tr. p. 108.] He also admitted that in making his appraisal he had not taken into consideration the fact that the surface use of the property desired to be purchased by appellant was limited by reason of the surface being covered with derricks and oil equipment, which could continue until 1963, and admitted that he had assumed in making his appraisal that the surface could be used without interruption. [Tr. p. 109.]

Mr. Johnson admitted that he had never appraised any waterfront property in Los Angeles, Long Beach, or San Pedro harbor [Tr. pp. 134 and 152]; that he had never examined the oil and gas lease on this property and did

not know the limitations imposed upon the use of the surface of the property by that lease [Tr. p. 141]; that his first appraisal of this property was on behalf of Mr. Newport and in aid of an attempt to obtain a loan on the property [Tr. p. 152, and see Tr. p. 155]; and that several of the properties which have been sold in the area have concrete seawalls whereas the property in question does not have any seawall and is badly erroded, having the front 1.63 acres under water [Tr. p. 144] and that he had not computed the cost of a seawall or bulkhead [Tr. p. 145]. He testified he was familiar with the Mason Report, Trustee's Exhibit 7, and did not question any of the prices per acre of sales shown in that report. [Tr. p. 151.]

Mr. Burgess admitted that he was not aware that this property had been previously offered for sale [Tr. p. 241] and that he based his appraisal entirely upon familiarity with leases which had been made in the area rather than upon sales [Tr. p. 241]. He testified he knew of no recent sales on Channel 3 or Channel 2 [Tr. p. 241] and was unfamiliar with the specific sales which had been made in that area as to which inquiry was made [Tr. pp. 242-243].

Mr. Newport [Tr. pp. 278-286] was clearly a prejudiced witness since he admittedly wishes to retain the present property to aid in a refinancing or reorganization scheme which he has tried to promote since the beginning of this bankruptcy more than 13 years ago and which he hopes may become possible of consummation in the future.

Thomas F. Mason testified on behalf of the Security-First National Bank that he had been a realtor-appraiser since June 1923, and had had a wide experience in the appraisal of real property, including a wide experience in the appraisal of waterfront property throughout Southern California and in Los Angeles Harbor. [Tr. p. 178.] He testified that in his opinion the fair market value of the property in question was \$184,000 in December 1945 [Tr. p. 190] and \$196,350 as of the date of trial [Tr. p. 180] and gave his reasons for that appraisal at length [Tr. pp. 180-182]. He testified that to put the property into usable condition as waterfront property, it would be necessary to construct a bulkhead and make a fill behind it that would cost for "a minimum bulkhead" \$52,500 [Tr. p. 184] and for the fill \$30,000 [Tr. p. 185], making a total of \$82,500. [Tr. p. 185.] He testified that only about one-half of the vessels coming into Los Angeles Harbor could dock at a 500 foot dock such as could be built on this property. [Tr. p. 187.] He testified that there had been only one sale of waterfront property in this area within recent years and that one large waterfront property had been on the market for approximately ten years. [Tr. p. 188.]

One cannot read the testimony of Mr. Mason without being impressed with his qualifications, his knowledge of the waterfront area involved and the thoroughness of his appraisal. It is not surprising that the Referee who heard his testimony accepted Mr. Mason's appraisal [Tr. p. 360] since he was clearly the best informed of the experts who testified. Indeed, it would have been surprising if the Referee had not accepted it.

b. THE OBJECTION THAT THE VALUE OF THE OIL AND GAS ROYALTY RETAINED BY THE BANKRUPT ESTATE WILL BE DEPRECIATED BY BEING SEPARATED FROM THE REVERSION.

It is not disputed by appellant that the attractiveness to a purchaser of the royalty without the reversion is less than the attractiveness of the royalty and reversion combined. The testimony on this point consisted of nothing more than statements to this effect. [Testimony of Roy G. Mead, Tr. p. 170, and letter of Albert A. Carrey, Tr. p. 192 *et seq.*, as to which it was stipulated that Albert A. Carrey would have so testified.]

It is, of course, obvious that Procter & Gamble Manufacturing Co. expects to receive something in return for its \$198,000 in addition to the right to use 1½ acres for a baseball park and parking area for its employees, subject, of course, to the prior right of usage by the Universal Consolidated Oil Company, and the right to use the front 150 feet, most of which is under water. Procter and Gamble must have assurance that not later than 1963 (the termination of the present lease) it can use the entire surface, and to protect itself in this connection it must own the reversionary interest under this lease; if it did not, the owner of the reversionary interest would have the right of access to the property, and the right to attempt to produce oil or gas therefrom so as to prevent full use of the surface of the property by appellant. It is manifest that this reversionary interest has some value. While it is difficult to determine the exact amount of value attributable to it, it is clear that the reversion is one of the elements going to make up the total value.

- c. THE OBJECTION THAT THERE MAY BE ADDITIONAL OIL ZONES UNDER THIS PROPERTY AND THAT THESE ADDITIONAL OIL ZONES WILL BE LOST TO THE BANKRUPT ESTATE UNLESS THEY ARE DEVELOPED BY THE PRESENT LESSEE.

There is no dispute as to there being three oil horizons in this general area which are known as the "Ranger Zone," the "Ford Zone," and the "237 Zone." The Ranger Zone is the only zone which has been produced on this property. The point made by the objectors is that at some time in the future it may become possible to produce from the Ford Zone or the 237 Zone, and that unless such production occurs under the existing lease and prior to 1963, it will not redound to the benefit of the bankrupt estate.

It is not disputed but that the Ranger Zone will in all probability be exhausted by the present lessee prior to the expiration of its lease in 1963. And, of course, in addition to the production from the Ranger Zone, any production from the Ford Zone or the 237 Zone during the term of the existing lease will redound to the benefit of the bankrupt estate.

Roy G. Mead [Tr. pp. 201-219; 264-268] and Albert A. Carrey [Tr. pp. 247-263] both testified to the possibility of production on this property from the Ford Zone and the 237 Zone.

Mr. Mead based his testimony *entirely* on the electric log from Well No. 6 on this property which was deepened to 100 to 150 feet below the ^{base} ~~case~~ of the Ford Zone [Tr. p. 224] but was never brought into production. He had no information as to the cores taken in deepening that well—had never examined them and had never examined the

production log or made inquiry as to the results shown by it. [Tr. p. 214.] After hearing the testimony of G. F. Follansbee, Jr., as to these matters, he was still of the opinion that "there is a possibility of some production" from the Ford Zone and the 237 Zone. [Tr. pp. 264-265.]

Mr. Carrey testified that in his opinion "there was and still is some possibility of production" from the Ford Zone [Tr. p. 255] and "that there might be a chance. There is a fair chance of production," from the 237 Zone [Tr. p. 257]. He also testified that Well No. 6 drilled by Universal Consolidated Oil Company was not conclusive of the absence of oil in these zones. He admitted, however, that he had not and would not, on the basis of presently known facts, recommend a forfeiture of the lease for failure to explore these zones [Tr. p. 259] and that he was "not in a position to say" whether a lessee could be found who would drill a well at the present time. [Tr. p. 260.]

G. F. Follansbee, Jr., Vice President of Universal Consolidated Oil Company, the present lessee, testified to the deepening of Well No. 6 on the property in question to a depth of 5,918 feet at which point it was estimated that the well was 100 to 150 feet below the base of the Ford Zone. [Tr. p. 224.] He testified that in deepening the well numerous cores were taken [Tr. p. 224] and that while there was some indication of oil it was his opinion, based on the electric log, the production log and the cores, that the well would not be commercially productive in the Ford Zone [Tr. p. 224]. Universal Consolidated Oil Company acted upon this opinion and plugged the well.

We have here two experts testifying from very limited knowledge to a "possibility" of production from the Ford

Zone and from the 237 Zone. On the other hand, we have the testimony of the expert in charge of the drilling of a well to below the base of the Ford Zone. That the Universal Consolidated Oil Company is considered to be a good operator and to have a good engineering staff was admitted by Mr. Mead [Tr. p. 214] and the action of that company in abandoning Well No. 6 speaks louder than the voice of experts having very limited knowledge of the facts, and whose money was not being invested in the well.

- d. THE OBJECTION THAT THE PROPOSED SALE WOULD NET LESS THAN \$198,000 AND THAT THE NET WOULD BE OF LESS VALUE THAN THE LAND TO THE BANKRUPT ESTATE.

It is not disputed by appellant that the sale will net less than \$198,000 to the bankrupt estate. The bid price was \$198,000, but as a condition it was required that certain surface obstructions be removed from 1½ acres of the premises, the removal of which it is estimated will cost a maximum of \$20,378 [Tr. p. 116] and there is the possibility of a deduction for a real estate commission.

While we recognize Joseph Sattler as a “finder” and think that the Referee had discretion to order the payment of a commission to him [Tr. p. 34] it is not a matter with which we are primarily concerned. Of course, if Judge Cavanah had thought or this court thinks that the commission cannot properly be paid it is a matter for modification and not reversal.

As to the possible necessity for the payment of income tax in connection with this sale, that clearly is not a proper element for consideration on the question of value, and it cannot be seriously argued that this bankrupt estate should not be liquidated because to liquidate it would necessitate

the payment of taxes. Every seller has the factor of taxes on any gain resulting from a sale, but this has no bearing on the fair market value of his property.

e. THE OBJECTION THAT THE SALE WOULD INTERFERE WITH REHABILITATION, REFINANCING AND REORGANIZATION.

The objection that the sale would interfere with rehabilitation, refinancing and reorganization is also based upon the theory of inadequacy of price and requires no additional discussion. However, the frequency with which it has been urged in this bankruptcy proceeding that refinancing programs are about to be consummated is worthy of note. On cross-examination, Mr. Newport admitted that he had asserted that a refinancing program was about to be consummated in 1935, in opposition to the efforts of the Security-First National Bank to foreclose its declaration of trust; that he had made the same assertion again in 1942, in opposition to a proposed sale of certain property; and that he had made the same assertion again in 1944, when the Security-First National Bank again sought to foreclose its declaration of trust. [Tr. p. 285.] In spite of these frequent assertions, a refinancing program has never been consummated, and there appears to be nothing more than a nebulous possibility of the consummation of such a program in the near future.

f. THE FINDINGS AND ORDER OF THE REFEREE.

The Referee, after hearing the testimony, made his written Findings of Fact, Conclusions of Law and Order [Tr. p. 26] wherein he found in accordance with the petition and wherein he found that the objections to the sale were without merit [Tr. p. 29]. He made his order that the sale "be and it is hereby confirmed." [Tr. p. 32.]

4. The Case Before the District Court on Review.

The objectors to confirmation filed a petition for a review on December 29, 1947 [Tr. p. 36], and the matter came on for hearing on March 11, 1948 [Tr. p. 312], before the Honorable Charles C. Cavanah, sitting temporarily in Los Angeles. It was represented to the court by the petitioners for review that an unusual situation had developed and that new facts had been discovered, and, on the basis of that representation, the court consented to the hearing of new evidence. [Tr. pp. 313-317.] This was presented by H. F. Metcalf, Trustee for the bankrupt, who had also testified before the Referee, and who was the only witness to appear before the District Court.

H. F. Metcalf was called as a witness by the petitioning objectors and testified that since the confirmation by the Referee a demand had developed for oil royalties where there previously had been very little demand [Tr. p. 321] and that he had "made the discovery" that prospective purchasers of oil royalties wanted the royalties not only under the existing lease but also a royalty on any production that might accrue after the termination of the lease [Tr. p. 325], and that, although he had previously recommended the sale, he did not now consider the sale to be for the best interests of the estate. He was afraid that the present sale might interfere with a subsequent sale of the royalties but had no reliable information on the point. Concerning it he said [Tr. p. 331]:

"A. Well, I have been told that that will be a serious detriment. Now, how much it would reflect itself in price, Mr. Cahill, or whether it would destroy the deal or not, definitely I don't know that."

With respect to possible purchasers of both surface and oil rights under the six acre parcel now in issue, as well as a nearby three acre parcel owned by the bankrupt estate, Mr. Metcalf testified [Tr. pp. 329-330]:

“A. Well, I haven’t definite offers, Mr. Cahill. If I had one, I would talk entirely differently. I haven’t definite offers. I have had casual offers, your Honor. I have had men who say we can get \$600,000. ‘Do you want to look at it?’ And I said, ‘No, I can’t wiggle out at \$600,000.’ ‘Will you pay \$750,000?’ They said, ‘We think we can get it—we think so.’

The Court: How much time do they want to think it over?

The Witness: God knows, your Honor.”

On cross-examination, Mr. Metcalf testified that at the time the sale was confirmed by the Referee it was his opinion that it was an advantageous sale.

At the conclusion of the new evidence introduced at the proceeding on review and at the conclusion of argument thereon, the court continued the matter for six and one-half weeks in order to give the Trustee an opportunity to secure further bids. [Tr. pp. 418-421.]

When the matter came on again for hearing [Tr. p. 292], a continuance was requested by counsel for the petitioning objectors in order to explore the possibility of another sale at a better price, and all parties (including counsel for appellant) acquiesced in the request. Judge Cavanah announced that he was leaving the following night and that he could give no continuance [Tr. p. 292]; that the Trustee had indicated that he could get another bid by that time and that he wanted to rule on the matter [Tr. p. 293].

The court was advised that the Trustee had been unable to obtain any better bid [Tr. p. 293] but that negotiations were in progress. Mr. H. F. Metcalf, the Trustee, was again called and testified to general efforts to secure better offers. [Tr. p. 300 *et seq.*] In response to a question by the court as to whether he really felt the bid of \$198,000 was inadequate, he replied [Tr. p. 306]:

“No, I don’t. I think, if that bid were properly safeguarded—and these gentlemen have shown pretty active feeling in that regard—I think if the oil—and I don’t see why, if Procter & Gamble mean what they say—and I feel sure they do—that some proposition couldn’t be worked out with them to protect the extra oil rights, whatever they might be, in the future. I don’t know. I can’t look 15 years ahead.”

The court commented twice on the inadequacy of the bid [Tr. pp. 308 and 311] but there was not the slightest suggestion of any gross inadequacy and it seems probable that the court’s thought that there might be some inadequacy was based on the increased value of oil and of oil royalties, although the oil royalties are, *in fact*, being retained by the bankrupt estate. The Trustee said that the price of oil was going up and the court commented [Tr. p. 306]:

“The Court: It is going up?”

“The Witness: It is likely to go up again.”

“The Court: Why slough it off under a bid like this?”

The court several times commented on the uncertainty of the situation as to getting better bids, saying at one point [Tr. p. 299]:

“He has not the bid. He is in hopes of getting one, if we keep putting it off.”

And at another point [Tr. p. 307]:

“There is a chance, as the trustee says here, if further time is given, maybe they can get more, but they do not know. It is like everything else.”

And at still another point [Tr. p. 309]:

“I would not be justified in continuing here, trying to administer the sales of certain parts of this estate, in hopes we might get another bid if certain things happen. The ‘if’ is always in the way.”

The court several times spoke as though the question before it were a question of confirmation of the sale and not one of the review of an order of confirmation.

“I think the only thing I can do, under this showing here, is to decline to confirm this bid, under the order of the sale of the Referee, and reverse it.

“You can go down there and do your business. You will not be here in the Court on any of it. If certain things happen, go down there and see if you can do some business; try it. That is the law.” [Tr. p. 308.]

“On this showing before me I would not be justified in confirming this sale at all.” [Tr. p. 309.]

“I am satisfied, in the interest of all concerned, I should not confirm this order of sale of the Referee for \$198,000.00.

“I have given you all a chance to see if you could do better, and we find you cannot. We are just where we were. I have to pass on it.

“The order will be, the sale of the Referee is not confirmed. It is reversed.”

“Gentlemen, you will have to go there to transact your future business.” [Tr. p. 309.]

B. The Law.

In the instant case the Trustee did not make a sale of the property. Instead, appellant made an offer to purchase the property which was submitted to the Referee by the Trustee with the recommendation that he approve and confirm the sale. The Referee's order was an actual confirmation of the sale and did not provide for the approval of the District Court, such approval not being necessary since the sale was for more than seventy-five per centum of the appraised value. (11 U. S. C. A. Sec. 110(f).) Upon the order of confirmation being made, equitable title to the property immediately vested in appellant. (6 Remington on Bankruptcy, 4th Ed. 1937, p. 60, Sec. 2569.) The order of the District Court reversed, vacated and set aside the order of confirmation and divested appellant of its equitable title in the property.

One cannot read the record of the final hearing before the District Court [Tr. pp. 292-311] without becoming convinced that Judge Cavanah treated the case before him as though it were a question of confirmation rather than a question of *review* of an order of confirmation. It was not even suggested that there was any fraud, accident or mistake such as would justify the avoidance of a sale between private parties. Judge Cavanah clearly based his act upon a belief that there might be some inadequacy of the price and upon the matter of expediency, namely, the fact that he would not be available for future hearings and thought there was some possibility of a deal being worked out which would be more advantageous to the bankrupt estate. We submit that an examination of the authorities shows clearly that this was an insufficient basis for the reversal of an order of confirmation and that there was an abuse of discretion in making the order of reversal upon that basis.

1. **A Confirmed Sale Can Be Vacated and Set Aside Only on a Showing of Fraud, Accident or Mistake Sufficient to Avoid a Sale Between Private Parties, or Such Gross Inadequacy of Price as to Raise a Presumption of Fraud.**

In 6 Remington on Bankruptcy (4th Edition 1937), page 60, it is said:

“§2569. Vacating Confirmation.—After a sale has been confirmed, it can be vacated for cause, but slight cause will not suffice.

“The confirmation of the sale does not vest the legal title in the purchaser, but does vest in him the full equitable title. Before confirmation the trustee’s sale is not a sale in a technical or legal sense, for, until confirmation, an accepted bidder is merely a preferred proposer or offerer; after confirmation, however, the case is different, and the confirmation cannot be vacated merely for inadequacy of price, but only for fraud, accident, mistake or some other cause for which equity would avoid a like sale between private parties.”

In *In re Realty Foundation, Inc.*, 75 F. 2d 286 (C. C. A. 2, 1935), the Referee in Bankruptcy had confirmed a bid of Foundation Properties, Inc., for certain assets in bulk of the bankrupt for a total of \$44,000. The unsuccessful bidder filed a petition to reverse the order of the Referee, and the District Court reversed the Referee and ordered a resale of the property. Foundation Properties, Inc., the successful bidder whose offer was confirmed by the Referee, appealed to the Circuit Court of Appeals. The decision of the District Court was reversed on the ground that the unsuccessful bidder at the hearing before the Referee had no standing to petition the District Court to

reverse the Referee's order, and the court said, at page 288:

“Appellee further seeks to sustain the court below on the novel theory that the latter had disposed of the appeal in accordance with a sound discretion. The difficulty with this is that, *in confirming the sale, the referee acted as a judge of the bankruptcy court with power to hear and determine the matter before him, and the District Judge had no power whatever to make orders in the general interest of the creditors, but stood only in the position of an appellate judge who might review the decision of the referee upon a petition taken by some one having a legal interest in the premises.*”*

In *In re Burr Mfg. & Supply Co.*, 217 Fed. 16 (C. C. A. 2, 1914), the court confirmed a sale of certain property of the bankrupt for \$6,250 to one Porter. A motion to vacate the confirmation to Porter was granted and another sale held, at which time \$8,500 was bid for the property and the sale confirmed. Porter appealed, and in reversing the order vacating the first sale to Porter, the court said at page 21:

“The rule is that inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court. The difference between \$6,250, for which the property was first sold, and \$7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the

*Emphasis added unless otherwise indicated.

amount of \$8,500 realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In *Lankford v. Jackson*, 21 Ala. 650, property worth \$1,000 was sold for \$6. In *Daly v. Ely*, 51 N. J. Eq. 104, 26 Atl. 263, property worth \$2,500 was sold for \$50. In *Hardin v. Smith*, 49 Tex. 420, property worth from \$2 to \$5 an acre was sold for 28 cents per acre. And perhaps a sale for a half or a third of actual value may be within the rule. *Sinnett v. Cralle*, 4 W. Va. 600. But such a difference in value as is shown in the case at bar cannot be regarded as coming within the rule, even when taken in connection with the circumstances already noted. The circumstances relied upon raise no presumption of fraud or unfairness.

“Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. In *Ballentync v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803 (1905), this course was allowed, the property being worth at least seven times more than the sum bid. But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. In *Morrison v. Burnette*, 154 F. 617, 624 (83 C. C. A. 391, 398 (1907)) the

Circuit Court of Appeals in the Eighth Circuit declared that:

“The rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids.’

“The court considered the rule so firmly established as to be no longer debatable, and in that view of the matter we concur. The cases are there collected, and need not be repeated here. And in view of the established principles there can be no doubt that the court below has committed a serious error in vacating the order confirming the sale made to the petitioner.”

In *Allen v. Union Transfer Co.*, 152 F. 2d 633 (C. C. A. 10, 1945) cert. den. 327 U. S. 807 (1935), a sale of the bankrupt's property for \$4,250 was confirmed by the Referee, but thereafter a bid for \$6,250 was received. Thereupon the Referee, on motion, set aside the first sale and ordered a second sale to be held, at which time a bid of \$9,050 was received for the property and the property sold at this price. On appeal, the District Court reversed the action of the Referee in setting aside his confirmation and ordered the affirmation of the first sale. On appeal, the action of the District Court was affirmed, the court saying at page 635:

“While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of

the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale. Such additional circumstances may be slight and insufficient in themselves to justify vacating the sale. 'The integrity of judicial sales is as important as their stability.'

"Here, there was inadequacy of price and the confirmation took place immediately after the sale and no opportunity was afforded the two creditors who did not have notice to object. But there were no facts presented showing any unfairness or impropriety in the sale to Union or raising any doubt as to the integrity of the sale . . .

"There being no circumstances throwing doubt on the integrity of the sale to Union, and the inadequacy of the consideration not being such as to shock the conscience of the chancellor, the order confirming the sale to Union should not have been set aside by the referee."

In *Petwabic Mining Co. v. Mason*, 145 U. S. 349 (1892), the court had ordered the sale of assets of a corporation whose charter had expired, and after doing advertising, a sale was duly made by the Master in Chancery. Petitions were made to vacate this sale, but in refusing to set the sale aside the court said, at page 356:

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect

the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet, the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, *it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto.*"

There are several cases holding on their facts that the Referee may at his discretion accept and confirm a substantially higher bid prior to the confirmation of the sale, even though the first bid is not grossly inadequate. These cases constantly carry dicta to the effect that after confirmation, a sale will not be vacated except for gross inadequacy of the bid or other matters sufficient to shock the conscience of the court. See *Reid v. King*, 157 F. 2d 868 (C. C. A. 4, 1946) and *Coulter v. Blieden*, 104 F. 2d 29 (C. C. A. 8, 1939).

2. A Referee's Findings Are Binding Upon the District Court Unless Clearly Shown to Be Erroneous, and a Circuit Court of Appeals Will Reverse a District Court Where It Has Disregarded This Rule.

There are numerous cases stating in various fashions that the findings of fact of a Referee in Bankruptcy should be accepted by the Courts, not only in confirmation cases but in all cases unless it is clearly shown that such findings are erroneous and would obviously result in a miscarriage of justice.

In re D. T. Bohon Co., 22 Fed. Supp. 561 (D. C. Ky. 1937), where a petition to review and to disapprove a Referee's refusal to confirm a sale made at public auction

for substantially less than the appraised value was denied and the Referee's ruling approved. The Court said at page 563:

"The referee had the opportunity of personal observation of and, perhaps, personal acquaintance with the witnesses. His location at the scene of the conflict enable him to view the entire picture at close range. He was in a particularly advantageous position to appraise the relative values of the various discordant opinions and to decide to which of them greater weight should be attributed.

"These considerations are at the foundation of the familiar rule that the findings of fact of the referee upon conflicting testimony should be accepted by the court unless it be clearly shown that they are erroneous and would obviously result in a miscarriage of justice.

"This rule was emphatically reaffirmed in a recent opinion of the Court of Appeals of this circuit in the case of *Kowalsky v. American Employers Insurance Company*, 6 Cir., 90 F. 2d 476, 479, decided June 2, 1937."

Baker v. Sproul, 37 F. 2d 937 (D. C. Pa. 1929), affirmed 37 F. 2d 938 (C. C. A. 3, 1930), where it was held that the findings of a referee should not be set aside except for "cogent reasons."

In *Kowalsky v. American Employers Ins. Co.*, 90 F. 2d 476 (C. C. A. 6, 1937), the referee granted the discharge of the bankrupt, but was reversed by the District Court. On appeal, the Circuit Court of Appeals reversed the District Court and affirmed the Referee's order on the ground that the District Court, in order to reverse the Referee's

order, must show "most cogent evidence of a mistake and a miscarriage of justice." The court said, at page 479:

"It is true that the District Judge is not bound by the findings of fact of a special master. Though he should not lightly set them aside, he may, if they appear to him against the clear weight of the evidence; and, if he does, the master's findings are without controlling force in Circuit Courts of Appeals. *Grossberger v. B. F. Goodrich Rubber Co.*, 8 F. (2d) 964 (C. C. A. 6); *In re Moran*, 299 F. 222, 224 (C. C. A. 6).

"But the District Judge should not disturb the findings of fact of a referee in bankruptcy, *unless there is most cogent evidence of mistake and miscarriage of justice*. In *Ohio Valley Bank Co. v. Mack*, 163 F. 155, 158, 24 L. R. A. (N. S.) 184, we said: 'No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 136, 137, 8 S. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289; *Emil Kierert Co. v. Juneau*, 78 F. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel*, 86 F. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of

credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent *evidence of a mistake and miscarriage of justice*. Loveland on Bankruptcy, §32a; *In re Swift* (D. C.) 118 F. 348; *In re Rider* (D. C.) 96 F. 811; *In re Waxelbaum* (D. C.) 101 F. 228; *In re Stout* (D. C.) 109 F. 794; *In re Miner* (D. C.) 117 F. 953.' See to the same effect: *Rasmussen v. Gresly*, 77 F. (2d) 252 (C. C. A. 8); *In re Slocum*, 22 F. (2d) 282 (C. C. A. 2); *Walter v. Atha*, 262 F. 75, 77 (C. C. A. 3); *Baker v. Bishop-Babcock-Becker Co.*, 220 F. 657 (C. C. A. 4); *Bank of Commerce v. Matthews*, 257 F. 292 (C. C. A. 7); *Id.* (C. C. A.) 272 F. 263; *In re Croonborg*, 268 F. 352 (C. C. A. 7); *In re Wheeler*, 165 F. 188 (C. C. A. 7)."

3. Although the Trustee Changes His Mind and Does Not Recommend Confirmation the Sale May Nevertheless Be Confirmed.

It has been held that where the Trustee changes his mind and does not recommend confirmation the sale may nevertheless be approved.

In *Currin v. Nourse*, 74 F. 2d 273 (C. C. A. 8. 1934) cert. den. 294 U. S. 729 (1935), a sale of certain of the assets of a bankrupt was confirmed on February 8, 1933, by the Referee in Bankruptcy upon the recommendation of the trustee, and on March 21, 1933, this was approved by the District Court. On appeal, the case was remanded for further evidence and on September 15, 1933, the Referee again confirmed the sale, although at this time the

Trustee in Bankruptcy refused to recommend the sale. Certain unsecured creditors appealed the confirmation of the Referee to the District Court, claiming that they had a better offer for the property. The District Court ordered the Referee to hear the evidence with respect to this alleged better bid but, upon hearing the evidence on December 2d, 1933, the Referee found there was not, in fact, a better bid and again confirmed the sale, although the Trustee still did not recommend the sale. The District Court sustained the Referee, and on appeal this decision was affirmed, the court saying at page 280:

“On the question of the real value of the properties, therefore, and what they ought to sell for, we attach importance to the sworn showing and the testimony of the trustee. When he petitioned the court for an order of sale in December of 1932, he suggested that an upset price of \$300,000 be set by the court, which shows he must have believed that such price, though doubtless less than he hoped to get, was not ‘grossly inadequate.’ . . . Also the sworn statement of the referee, on making the sale, that he had used reasonable diligence to sell the properties and that in his opinion the sale to Stern Bros. was the best cash offer that he was able to obtain, persuade that such was his belief at the time. A point is made of the fact that when the trustee was called as a witness at the hearing on confirmation before the referee in August and September of 1933, *more than six months after he had made his sworn return, he refused to recommend confirmation of the sale.* He did not deny that he had made every reasonable effort to sell the properties at the best possible price, nor that the Stern Bros.’ bid was the best that he had been able to obtain. *We think his testimony reaffirms his sworn return as to those vital matters.*

- But it was his thought that the responsibility for confirmation or refusal to confirm the sale rested upon the court and not on him, and his attitude was that if a better deal for the creditors could be had, he would be for it, he wanted to hear the evidence. His testimony also reflects that he then thought that if he could be continued in control and operation of the property, he could ultimately work out more for the creditors. On this basis, he would not recommend the confirmation of the sale. *Such hopes, however, developed so long after sale, were not controlling upon the court.*

“Appraisals have been made of the properties reflecting a much greater value than that obtained on the sale. It is undoubtedly true, as stated by Judge Otis in his opinion of November 22, 1933, that ‘a large majority of the general creditors appear to believe that the amount bid by Stern Brothers is inadequate and that the properties are worth much more and can be sold for much more,’ but such *beliefs, however honest, as well as the opinions of expert engineers and appraisers, avail nothing against the stern fact that a better bid was not to be had.*”

4. The Public Interest Requires Stability in Judicial Sales.

Several cases emphasize the public interest involved in regard to judicial sales.

In *In re Hoffman*, 16 F. 2d 939 (D. C. Pa. 1927), real estate belonging to the bankrupt was sold at public auction for \$164,983.24, being 93.4% of its appraised value. At the hearing on confirmation, the appellant appeared and objected to confirmation on the ground of inadequacy of price, and thereupon offered \$171,000 for the property. The Referee ordered the appellant to file a bond for

\$171,000 conditioned upon faithful compliance with his bid; appellant refused to file this bond unless his bid was accepted, and thereupon the Referee confirmed the sale for \$164,983.24. Appellant then bid each parcel separately (except for one small parcel) at an increase averaging 8% and totaling \$176,818, and offered to put up 10% of his bid in cash. The Referee refused his offer and confirmed the initial sale. On appellant's petition to review the Referee's order, the court affirmed this order and said, at page 940:

“Public policy requires stability in judicial sales, to induce bidding at such sales and reliance upon them. The purpose of the law is that they should be final; they are not to be disturbed, except for substantial reasons. We think the reasonings of the learned referee are unassailable, and his conclusion correct.”

In *In re Pneumatic Tube Steam Splicer Co.*, 60 F. 2d 524 (D. C. Md. 1932), the court, in refusing to vacate a sale confirmed by the Referee of the assets of a bankrupt corporation said, at page 527:

“Nothing should be done to weaken confidence in the stability of judicial sales. There must be some real cause before they will be upset. Inadequacy of price alone is rarely sufficient—that is, there must be proven gross inadequacy, or circumstances from which palpable mistake or fraud is to be inferred. The order provided that the property should not be sold for less than 75 per cent. of its appraised value. Here the appraised value was slightly exceeded. Were the court to rescind the sale and order another, there is no assurance whatever that the property could then be disposed of at all. Certainly, under these circumstances, the court would not be justified in

depriving a *bona fide* purchaser of his rights. *Bal-lentyne v. Smith*, 205 U. S. 285, 27 S. Ct. 527, 51 L. Ed. 803; *Speers Sand & Clay Works v. American Trust Co.* (C. C. A.), 52 F. (2d) 831; *In re Burr Mfg. & Supply Co.* (C. C. A.), 217 F. 16. It may be assumed, without deciding, that, *were the representations made to the court not merely of a vague and speculative nature, but in the form of an actual offer to pay substantially more for the property, the situation might be different.*"

5. Even Before Confirmation It Has Been Held That a Higher Bid May Properly Be Refused.

Even before confirmation of a Trustee's sale has taken place it has been held in some cases that it is not an abuse of the court's discretion to refuse to consider a higher bid for the property.

In *Prentice v. Botcler*, 141 F. 2d 175 (C. C. A. 9, 1944), property was sold by the Trustee in Bankruptcy at a private sale, subject to confirmation of the court, for \$2,250. At the hearing for confirmation before the Referee, appellant bid \$2,325, or \$75 more than the best bid received at the private sale. The Referee confirmed the lower bid and his action was approved by the District Court. On appeal, the court affirmed these judgments and stated at page 177:

"The practice followed in connection with judicial sales is clearly explained in *Jacobsohn v. Larkey*, 3 Cir. 245 F. 538, 541, L. R. A. 1918C, 1176: 'After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and

prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person subsequently made, to bid higher on resale. [Citing cases.]' The reasoning developed is equally applicable to the situation involved herein, where there is an attempt to block confirmation of a trustee's sale by making a slightly higher bid before the referee, as to the resale situation discussed in the *Jacobsohn* case."

In *In re Stanley Engineering Corporation*, 164 F. 2d 316 (C. C. A. 3, 1947) cert. den. 68 Sup. Ct. 351 (1948), the bankruptcy court authorized the sale of the assets of the Stanley Engineering Corporation, a bankrupt, at public auction. The property had been appraised at \$50,000, and one Galman made the high bid of \$57,200. Galman then entered into a contract of sale with the Trustee in Bankruptcy and submitted a certified check for 15% of the purchase price. The Trustee thereupon petitioned the bankruptcy court to confirm the sale, and at the hearing on confirmation, a representative of the Gaby Company appeared and offered \$63,250 for the property, or about 10% more than Galman's bid. At the hearing, the bankruptcy court announced that it contemplated directing a new public sale contingent upon the filing of a bond by the Gaby Company to insure the renewal of its bid at such sale. Counsel for the Trustee urged the court to avoid the delay of another public sale and to conclude the matter at that time after giving Galman the opportunity to make a further bid, and the court acceded to this suggestion. Thereupon Galman said that he would meet the bid of the Gaby Company, whereupon the Gaby Company increased its bid to \$67,250. When Galman refused to

match this bid, the court thereupon accepted the bid of the Gaby Company and confirmed the sale. Galman thereupon appealed, and the Circuit Court of Appeals held that it was an abuse of discretion to refuse to confirm the initial bid of Galman in the amount of \$57,200 and said, pages 318 and 319:

“The Bankruptcy Act, as amended by Section 1, 52 Stat. 879 (1938), 11 U. S. C. A. §110, sub. f., provides as follows: ‘* * * Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value * * *’

“While the extent of the power of the bankruptcy court, in denying a confirmation or setting aside judicial sales, is not spelled out in the statute, the extent of such power has been spelled out in numerous decisions.

“These decisions establish:

“That judicial sales, made upon due notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale; or (b) the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake. Mere inadequacy of price is not a sufficient ground for setting aside a judicial sale where there was no unfairness in the conduct of the sale. In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited. *Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross*

inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion.” (Emphasis by the Court.)

In *Sturgiss v. Corbin*, 141 F. 1 (C. C. A. 4, 1905), the court ordered two commissioners to sell certain property of the bankrupt, and accordingly it was sold at public auction for \$154,000. At the hearing for confirmation of the sale, an offer of \$160,000 was submitted, and at that time the court ordered a resale in its presence, at which time one Sturgiss bid a total of \$200,200, and the property was sold pursuant to this bid in the presence of the Court; this latter sale was then brought before the court for confirmation, at which time another bid of \$208,000 was received. The court then ordered another resale, and finally the property was bid in for \$220,000, and the sale confirmed. On appeal, the Circuit Court held that the District Court abused its discretion in setting aside the sale for \$200,200 to Sturgiss and said in this connection (p. 3):

“The advance offer of \$7,800 was, of itself, under the circumstances attending the purchase by Sturgiss, not sufficient to warrant the setting aside of the sale. A sale made under a judicial decree will not, when no misunderstanding existed among the bidders, and when no fraud is shown, be set aside for mere inadequacy of price, unless such inadequacy is *so gross as fairly to raise a presumption of fraud*. The practice of opening biddings and of setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants, and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the

terms thereof, or who shows his willingness and ability so to do, is not only entitled to the protection of the court, but as a party to the proceeding, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of the inadequacy, fraud, or mistake before alluded to.

.
“ . . . The additional offer was not of such a character as would demonstrate inadequacy of price, or justify a refusal to confirm. If a judicial sale has been fairly conducted, as was the sale we now consider, the rights of the purchaser should be protected, not only because it is his due, but also for the purpose of protecting such sales from the evil and chilling influences of instability and doubt.”

Conclusion.

We think the foregoing authorities when applied to the facts in this case clearly require that the order of the District Court be reversed and the order of the Referee be reinstated and affirmed.

Respectfully submitted,

O'MELVENY & MYERS,

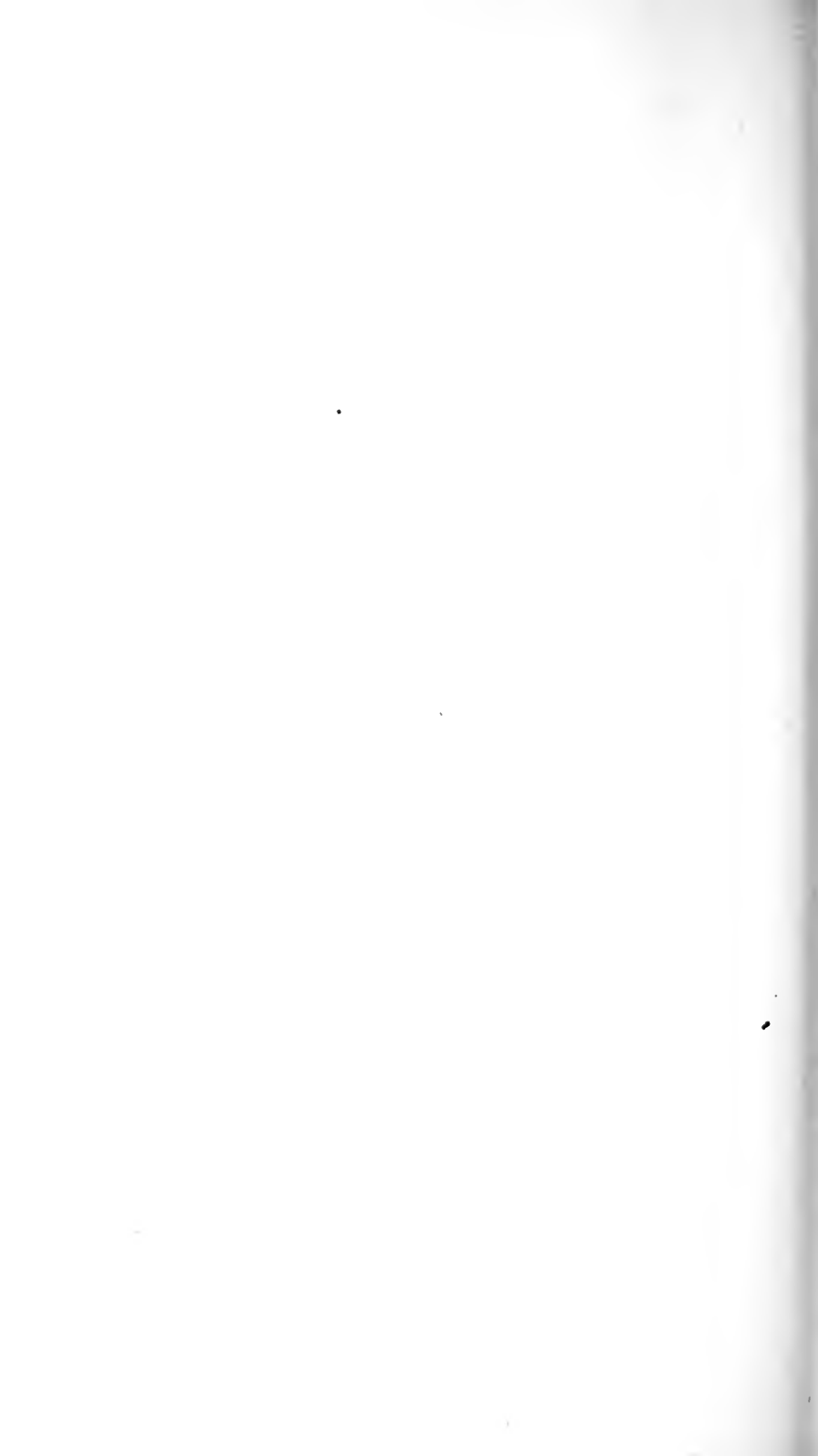
PIERCE WORKS,

RICHARD C. BERGEN,

HOWARD J. DEARDS,

By HOWARD J. DEARDS,

Attorneys for Appellant Procter & Gamble Manufacturing Co.



No. 11962.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

Appellant,

vs.

H. F. METCALF, Trustee in Bankruptcy of the Estate of
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H. NEBLETT, MRS. F. P. NEWPORT, EUGENE P. CLARK,
E. P. NEWPORT CORPORATION, LTD., RUBY E. NEBLETT,
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES and
JOSEPH SATTLER,

Appellees.

**MEMORANDUM ON APPEAL BY JOSEPH
SATTLER, APPELLEE.**

FILED

OCT 7 - 1948

PAUL P. O'BRIEN, -
CLERK

JOSEPH SATTLER,
458 South Spring Street, Los Angeles 13,
In propria persona



No. 11962.

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SECURITY-FIRST NATIONAL BANK OF LOS ANGELES and
JOSEPH SATTTLER,

Appellees.

**MEMORANDUM ON APPEAL BY JOSEPH
SATTTLER, APPELLEE.**

Now comes Joseph Sattler and files this Memorandum relative to the pending appeal by the Proctor & Gamble Manufacturing Co. from the order of confirmation of sale of the real estate in the above entitled matter, and your appellee respectfully desires to call the Court's attention to the following matters:

I.

That the above entitled bankruptcy matter is the result of an involuntary petition in bankruptcy filed on March

19, 1935; that the adjudication in bankruptcy was entered by the Court on January 12, 1937. That the primary cause for the bankruptcy proceedings was to prevent the Security-First National Bank from selling the property, a portion of which is involved in this sale, to satisfy the obligations of the Bankrupt to the Bank. That an orderly administration of this estate has not, in the opinion of the appellee, been had, the Bankrupt apparently frustrating every progressive step attempted by the Trustee on behalf of the creditors.

II.

That the claims of general unsecured creditors in this estate, as filed herein, approximate less than \$100,000.00 in amount. That the records of the Referee's court demonstrate that fees allowed therein, some of which have not been paid, approximate the sum of \$130,000.00. This, in the opinion of your appellee, is due to the prolonged administration of this estate.

III.

That for many years the Trustee and the creditors have endeavored to procure a buyer for the property involved in this appeal, and particularly during the last six years. That finally a firm offer for the purchase of the said property was procured by your appellee from Proctor & Gamble at the price of \$198,000.00, which is, all things considered, a very fair offer under the circumstances. It must be borne in mind that so long as the obligation of the Security-First National Bank is unpaid, the interest on the principal must be provided for and the taxes on the property must be paid, and the longer the sale is delayed the less probability is there of any dividends being

paid to unsecured creditors. In the present proceeding there was absolutely no showing made but that all the requirements of the Bankruptcy Act for the return of sale, the hearing on which was full and fair, was not made and had, and there was no showing whatsoever that the offer made was not the best offer that could be received, and that such offer was probably a better one than any that will hereafter be procured. There was no legal showing of any kind or character in the Record on Review justifying the Court to reverse the order of confirmation of the sale, in the opinion of your appellee. Neither the vague promises of a better offer, nor the actual production of a higher bid, justifies the Court's vacating the confirmation of the sale. In this connection permit us to call the Court's attention to the case of

In re Stanley Engineering Co., 164 F. 2d, p. 316

which held that:

"The Circuit Court of Appeals for the Third Circuit sitting *en banc*, has ruled upon the question whether a court should upset a judicial sale at auction upon the ground that a new bidder has appeared who offers more than the knock-down price.

The opinion by Circuit Judge Kalodner reviews the authorities on the question and holds that it was an abuse of discretion for the bankruptcy court to fail to confirm a judicial sale, where the only apparent reason for the court's action was its desire to obtain the benefit of a higher bid made at the confirmation hearing."

We particularly desire to call the Court's attention to the authorization of Joseph Sattler to act as broker in this matter and the justification of the order allowing

him a commission as broker for procuring the Procter and Gamble Manufacturing Co. as the highest bidder and purchaser of the property herein involved.

Some opposition has been made by Mr. Newport, an officer of the bankrupt, who himself is a real estate broker and we understand has been paid heretofore, directly or indirectly, commissions for sale of the bankrupt's property herein. The position seemed to be based upon the alleged fact that no authorization by written order of Court was given to Mr. Sattler to act as broker. In this very same estate on many occasions and on prior sales real estate commissions have been paid by the Trustee and the Court to brokers upon procuring bidders for property of the estate and in practically no instance was there any prior written authorization, but the sales were handled in the same manner and the buyers were procured in the same manner as was done in this instance.

If Mr. Newport's position is that Mr. Sattler should have had written authorization from the Trustee, then in turn of course the Trustee would have had to have had the authorization by the Referee. In this case the Referee directly authorized Mr. Sattler to act as the broker and told him that his compensation would not exceed \$5000. [Tr. of Record, Vol. II, p. 29.]

In addition on December 1, 1947, as appears in page 291 of Vol. II of the Transcript of Record, statement by Mr. Metcalf:

“I would like to comment on the fact that these commissions are being paid. The only possible way I consider that they can sell property in Las Crescenta and Verdugo Woodland is to employ brokers and, I can do better work through a broker than I can direct.”

At this point Mr. Lynch, attorney for the Trustee, read into the record from Mr. Sattler's card which reads as follows:

"Joseph Sattler, 218 H. W. Hellman Building, Los Angeles, Calif. Permit #11732 License No."

As to whether or not Mr. Sattler procured Procter & Gamble Manufacturing Co. there can be but little doubt, and we again refer the Court to page 290 of Vol. II of the Transcript of Record, wherein the attorney for the Trustee, Mr. Lynch, asked:

"Do I understand this gentleman (Joseph Sattler) produced this person here?"

Referee: He contacted the Procter and Gamble Manufacturing Co.

Procter & Gamble representative: He was the finder and we have handled the negotiations from that point."

In addition to the foregoing, we respectfully call the Court's attention to the voluminous correspondence between Mr. Sattler and the Procter & Gamble people as shown by Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P and Q, appearing in Transcript of Record, pages 68 to 85 of Vol. I.

We know of no provision in the Bankruptcy law requiring the appointment of brokers by order of Court. In this respect permit us to direct the Court's attention to General Order in Bankruptcy No. 45, which provides for orders only in the case of auctioneers, accountants and appraisers.

In the present case, not only was there not presented a higher bid, notwithstanding the Court's granting five weeks in which to procure such, but there was not even a definite promise that one would or could be procured. And even up to the present day neither Trustee nor Bankrupt has been able to procure any other buyers for this property at a price in excess of the bid confirmed by the Procter & Gamble Manufacturing Co. Does this mean that this estate is to be kept open for another period or eleven or twelve years, and without doubt if it is the real estate market along with other commodities will suffer a material decrease in value.

Surely, this case must sometime come to an end and it cannot until the Trustee disposes of the property of the estate.

We respectfully call the Court's attention to the foregoing matters and respectfully pray that the order of the lower Court be reversed.

Respectfully submitted,

JOSEPH SATTLER,

Attorney for Appellee.

No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

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Appellees.

Reply Brief of Appellees, Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene P. Clark, and F. P. Newport Corporation, Ltd.

LAWRENCE M. CAHILL,
1102 Hollingsworth Building, Los Angeles 14,
Attorney for Appellees Dorothy Day, et al.



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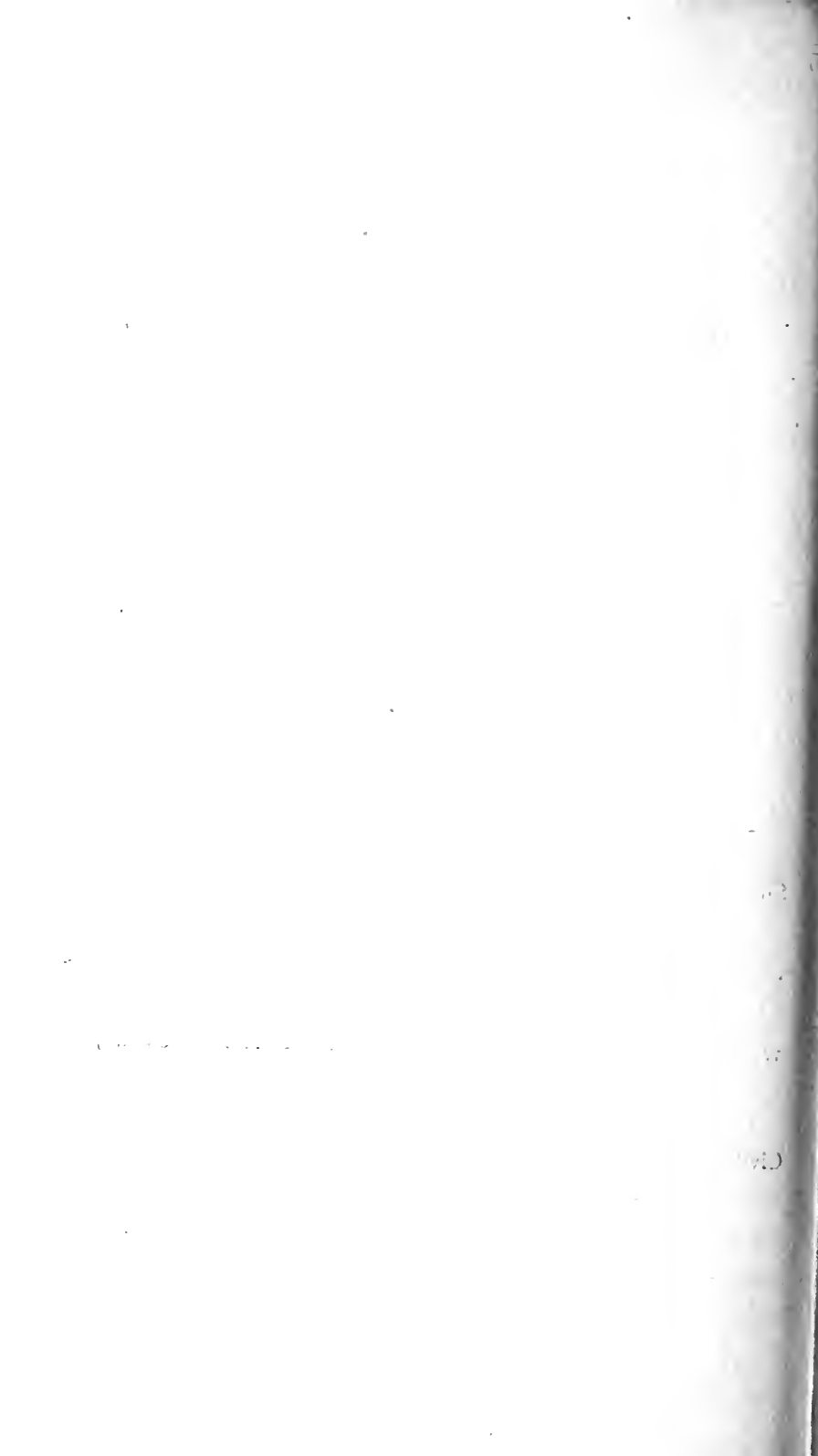
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Appellees.

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Preliminary Statement.

Of the last named appellees, Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport and Eugene P. Clark, are unsecured creditors of the F. P. Newport Corporation, Ltd., the bankrupt corporation, and F. P. Newport Corporation, Ltd. is the said bankrupt.

Said unsecured creditors and the Bank of America National Trust and Savings Association were the subject of

Finding No. "11" included in the "Findings of Fact, Conclusions of Law and Order of the Referee" dated December 19, 1947, which is as follows:

"That Dorothy Day, Martha McMillen, Matilda Olsen, William H. Neblett, Mrs. F. P. Newport, Eugene P. Clark and Bank of America have filed, in the bankruptcy proceedings herein, unsecured claims against the bankrupt corporation in the approximate sum of \$140,000.00, which is approximately 70% of the unsecured claims so filed in this proceeding." [Tr. p. 29.]

Said unsecured creditors, on November 13, 1947, filed with the referee written objections to the proposed sale, and another unsecured creditor, Ruby E. Neblett, filed on said day separate written objections thereto.

When the matter of the proposed sale and of the objections thereto were first called for hearing on November 13, 1947, Bank of America National Trust and Savings Association appeared through its counsel, Edmund Nelson, Esq., and stated orally that it objected to said sale. [Tr. p. 77.] In reference of said written objections we find the following in said Findings of Fact, Conclusions of Law and Order:

" . . . and Bank of America having, in open court, joined in said written objections" [Tr. p. 27.]

Bank of America did not file a petition for a review of the referee's said Order, dated December 19, 1947, but said appellees and the bankrupt did, and at the hearing before the District Court on March 11, 1948, of the peti-

tion of said appellees to review said Order, the following took place:

“Mr. Cahill: At this time Bank of America appears through its counsel and offers to aid the bankrupt and the creditors represented by myself in the prosecution of this petition for a review; and at this time I move your Honor that Mr. Edmund Nelson be associated as counsel with myself in this proceeding (5).

“The Court: He may do so.” [Tr. p. 313.]

Of the numerous persons interested in said proposed sale no appeal has been taken to this Court by said Bank or by any of the other secured creditors; nor by Security-First National Bank of Los Angeles, the secured creditor; nor by the trustee in bankruptcy; nor by the bankrupt; nor any of the unsecured creditors, from the Order of the District Court of May 10, 1948, entitled “Order vacating and setting aside referee’s Order of December 19, 1947, *re* sale of Real Property to Procter & Gamble Manufacturing Company.” The sole person appealing is the last named company, the proposed purchaser.

It is important to note also that Joseph Sattler, who has filed with this Court a document entitled “Memorandum on Appeal by Joseph Sattler, Appellee” wherein he prays “that the order of the lower court be reversed” *has not appealed from said order*. Said order as to him is a final order and it would appear that his said “memorandum” praying for reversal of an order that he has not appealed from should be stricken on that ground alone. There exists, however, an additional reason why said memorandum should be stricken and that is that totally unsupported allegations have been set forth therein, particu-

larly in paragraph "I", "II" and "III" thereof, which are not true, and in one instance is so serious as to be deemed by the bankrupt as being on the border line of libel. Claims of unsecured creditors actually in a sum in excess of \$200,000.00 [Findings, par. 11; Tr. p. 29] are set forth in said memorandum as being "approximately less than \$100,000.00 in amount" (Memorandum p. 2) and of total fees for referee, receiver, trustee, reporters, consultants and attorneys in the total sum of approximately \$136,744.66, in an estate that has operated as a going concern over a long period of years with a gross income a few thousand dollars less than \$2,000,000.00, of which said fees in excess of \$75,000.00 remain unpaid, this Honorable Court is advised by said memorandum as to said unpaid amount as follows:

" . . . some of which have not been paid." (Memo- p. 2.) (See *U. S. v. H. H. Metcalf*, as trustee, etc., 131 F. 2d 677, where this Honorable Court held that said trustee was conducting a business, and required to pay income taxes upon the profits therefrom.

Elsewhere herein reference will be made to the statement made in paragraph "III" of said memorandum that "the price of \$198,000 . . . is all things considered, a very fair offer under the circumstances," which will be considered in the light of the following appearing in a letter certified by the referee to have been "written by Mr. Sattler . . . in an effort to sell the property . . ." [Tr. p. 67]:

"If in the near future some understanding should be made between the oil company and the estate, *the price for this property, in private hands, might be quoted around a million dollars.*" [Tr. p. 86.] (Emphasis added.)

Statement of the Case.

The facts presented by appellant under the heading "Statement of the Case" have been limited to nine short sentences which take up less than one page of its opening brief. (App. Op. Br. p. 3.) Apart from said nine sentences this Honorable Court can only become advised as to the facts by either examining the Transcript of the Record, which is composed of 425 pages, or by considering such facts as are set forth by appellant in that part of its opening brief entitled "Argument."

The difficulty with the procedure last mentioned is that such facts as are there set forth are not only interspersed with appellant's contentions and its argument in reference to same; but are scattered throughout the various points set forth under the heading "Argument" over the remaining 36 pages of its opening brief.

Appellees feel, therefore, that it is incumbent upon them to set forth at this place a comprehensive recital of facts. They feel, also, that such procedure is necessary in the light of the fact that whatever factual recitals as have been made by appellant anywhere in its opening brief are such as tend primarily to bring into consideration the question of the adequacy of the price offered by appellant for the real property owned by the trustee in bankruptcy.

If "adequacy of price" were the sole or primary objection made by appellees to the proposed sale the matter would not be so serious. "Adequacy of price" having been neither the sole nor primary objection, and there having been a number of objections made by appellees in

reference to the detriment to other assets of the Estate through the unusual and extraordinary conditions appellant had attached to its offer of purchase, such objections should, in the opinion of appellees, be placed before this Honorable Court at the outset in their fullness, rather than as a matter of casual mention here and there throughout appellant's argument. It is believed that this Honorable Court will then more readily observe why the Judge of the United States District Court, after taking of additional testimony and listening to arguments of all interested parties over a period of two days [Tr. p. 91 to 94] and after reading "the entire transcript of the testimony before the referee" [Tr. pp. 92, 93]; and being undoubtedly profoundly shocked by what was revealed thereby; promptly set aside the order of the referee after first making, amongst others, this express finding:

" . . . and that the terms and conditions imposed upon the trustee and the within Estate, by said Company, as terms and conditions of said sale, *were and are detrimental and injurious to the within Estate* and to the best interests of the creditors thereof; and it further appearing that the Referee was acting beyond his jurisdiction in ordering the payment of said real estate broker's commission, and in its payment *under the circumstances shown* would have been unauthorized, and contrary to law; and *that many of the objections presented in writing to the Referee at the hearing before him were serious objections that should have been sustained by him . . .*" [Tr. pp. 93-94.] (Emphasis added.)

THE FACTS.

The Trustee's Petition.

On October 27, 1947, F. P. Newport Corporation, Ltd., a corporation, was an adjudicated bankrupt [Tr. p. 5]; the Honorable Hugh L. Dickson was the qualified and acting referee to whom said matter had been assigned [Tr. p. 6] and H. F. Metcalf was the duly appointed, qualified and acting trustee in bankruptcy in said matter. [Tr. p. 7.]

That on said day said trustee filed with said referee his petition, in writing, for an order confirming sale of real property and praying that "notice of the hearing of this petition be given as required by law" [Tr. p. 10]; that "upon the hearing of said petition" [Tr. p. 10] an order be made approving the sale to appellant "*subject to the conditions set forth in the offer as hereinbefore set forth*" [Tr. p. 10] (emphasis added); that petitioner "be authorized to enter into a contract for the removal of tanks, poles, oil lines, sumps, etc., set forth in subdivision (d) of paragraph 4 of this opinion, in order to comply with the terms of said offer" [Tr. p. 10]; that he be authorized to pay to proceeds of the sale to the secured creditor upon it releasing its claim against said property by deed reserving ". . . unto the sellers all interest and rights, rents, royalties . . ." accruing to the said trustee as Lessor under an existing oil and gas lease upon the property involved [Tr. pp. 10-11] and that petitioner be authorized to "pay recording charges, escrow fees, title fees, internal

revenue stamps . . .” and other expenses, including “All expenses incurred by petitioner in the matter of removing all storage tanks . . .” etc. [Tr. p. 11.]

No authorization was sought for the payment of a real estate broker's commission and said petition did not set forth any statement or facts whatsoever upon that subject.

The lands described in said petition were by metes and bounds description which discloses that they are situate in the Long Beach Harbor area and have frontage of 500 feet on Channel No. 3 [Tr. p. 7], and said petition recited that appellant offered the sum of \$198,000.00 for same, subject to the condition that the trustee vested title of said land in appellant, including “all minerals, oil, gas . . .” free and clear “but reserving and excepting unto said trustee in bankruptcy all rents, royalties, and other things of value accruing pursuant to and *prior to the expiration, surrender or other termination* of that certain oil and gas lease dated January 14, 1938, by and between said Trustee in Bankruptcy, *et al.*, and the Universal Consolidated Oil Company as Lessee . . .” [Tr. p. 8.] (Emphasis added.)

Said petition also, amongst other things, set forth that the estimated cost of removing said oil well tanks and equipment was “between \$15,000 and \$16,000.” [Tr. p. 9.]

The Objections of Appellees and the Separate Objections of Bank of America National Trust and Savings Association and of Ruby Neblett.

Appellees, on November 13, 1947, filed with said referee their written objections to the proposed sale set forth in said petition.

Believing that the proposed sale was highly dangerous to the estate, because of the conditions attached to appellant's offer of purchase, and believing that a detriment would certainly affect the remaining assets of the estate because of such conditions, and that the loss resulting therefrom might equal or exceed the total sum offered by appellant; appellees included in said written objections the following:

"III.

"That the condition set forth in subparagraph '(b)' of paragraph '4' of said petition, that the trustee shall convey to the buyer 'all minerals, oil, gas and other hydrocarbon substances, in or produced upon said lands,' reserving only to the trustee the rents or royalties under the present lease with Universal Consolidated Oil Company, is not only inequitable and unjust and highly dangerous in a business sense as to the trustee, but will, as your objectors are informed and believe and for such reasons allege, operate to the detriment of the within estate and to their rights therein by causing a loss to the estate which may exceed in amount the total purchase price of \$198,000.00 offered by the proposed purchaser, and in this regard objectors specify as follows:

"(a) That your objectors have been informed by thoroughly competent authorities, and they believe and for such reasons allege that because of the difference in value to royalty buyers be-

tween minerals, in places owned by the seller, and rents and royalties under a lease, that the value of the estate herein of its interest in the oil and gas yet to be (15) recovered from said lands, will drop fifty per cent (50%) immediately upon the transfer of said lands under said condition, and that said depreciation will take place solely because of said condition;

“(b) That in addition the within estate, under said condition, and notwithstanding said reservation will be in grave danger of taking an equally great loss by being deprived in the future of all rents and royalties, now being received by said trustee, through his present lease with the Universal Consolidated Oil Company. The reason is obvious. Universal Consolidated Oil Company has the right to abandon its lease with the trustee at any time by quitclaiming the demised premises to said trustee, or otherwise.

“If that were done today the trustee has a perfect legal right to lease said lands to other oil companies. It is common knowledge that in the Los Angeles Basin lands are frequently leased profitably after the original lessee-producer has abandoned his lease. The trustee would also have the right, following such abandonment or quitclaiming to enter upon the said lands and produce the wells now located thereon taking the entire production to himself.

“Both of said rights will be immediately lost to the trustee because of said condition.

“It is equally obvious, that the proposed purchaser could under said condition, with perfect legal right, approach said Universal Consolidated Oil Company the day after the proposed purchaser acquired title, as proposed, and offer to said Oil Company, any sum

from one dollar to a million dollars that it thought said Oil Company would accept, as an inducement to abandon its lease or (16) to quitclaim said described lands.

“And the day after that happened the purchaser could lease the same lands with perfect legal right to Universal Consolidated Oil, or to any other person, and the trustee would not only no longer have any interest in the oil and gas produced from said lands or the rents or royalties therefrom, but he would have no right to complain of any such transaction, because under said condition he not only leaves himself ‘wide open’ to the happening of such a transaction but, even through unintentionally, he almost invites it.” [Tr. pp. 13-14-15.]

“IV.

“That said proposed offer of \$198,000.00 is not in reality an offer in that sum for as set forth in subparagraph ‘(d)’ of said paragraph ‘4’ the proposed purchaser attaches still another condition to his offer and that is that the trustee shall pay all costs of moving ‘all storage tanks, power poles, oil lines, sumps, steam (18) lines and concrete walls’ (one concrete wall excepted) now located on said lands.

“That, in the opinion of your objectors this is an operation that said trustee should in no event engage in. It is apparent that if the trustee, while engaged in such operation, should cause loss of life, or damage to property through explosion, fire, flooding or for any other cause that the within estate might be held liable in damages in very great sums of money.

“In paragraph ‘5’ of said petition the trustee states that he believes that the cost of removal can be limited to between \$15,000 and \$16,000. There is no assurance, however, that the estate will not actually pay

out double or treble those sums. Your objectors are informed and believe and for such reasons allege that the said trustee has until very recently estimated the cost of such removal at approximately \$33,000.00." [Tr. p. 17.]

Other objections set forth therein were placed upon the ground that oil had been produced from the six acre parcel proposed to be sold to appellant, during the period of the trusteeship, of a total value of \$1,341,363.04; all of which had been produced from oil sands overlying two lower sands known as "The Ford Zone" and the "237 Zone" which were producing profitably upon adjacent and adjoining lands from wells as to which it was alleged that one well was but a few hundred feet from the said six acre parcel; and that, while the said trustee had the right, absolutely, under his lease with Universal Oil Company, to produce or to cause others to produce from such sands in the event that said company elected not to produce oil therefrom, or quitclaim said lands, or abandon its lease; that the trustee's right to so produce upon the happening of one or all of said events would cease to exist *ipso facto* with the transfer of said six acre parcel to appellant under the conditions imposed by it. [Tr. pp. 15-16.]

Appellees' objection as to the inadequacy of price was set forth as follows:

"I.

"That the lands described in said petition have a fair market value in the sum of Four Hundred Thousand Dollars (\$400,000.00) and the offer received by

the said trustee in the sum of \$198,000.00 as reported in said petition, is an entirely inadequate price being less than one-half of the present fair market value of said (14) lands.

“II.

“That said lands were appraised, by a thoroughly competent appraiser, about a year ago, who rendered his report to the above named bankrupt herein, in furtherance of the reorganization plans of said bankrupt, wherein he stated that said lands had a fair market value in the sum of \$391,386.60.

“That your objectors are informed and believe and for such reasons allege that because of the tremendous development program by the City of Long Beach, now under way in reference to this harbor, and for other well known reasons, that the fair market value of said lands has increased since said appraisal was made.”
[Tr. pp. 12-13.]

Further objection was made upon the grounds that the proposed sale was otherwise not to the best interest of the estate or to the creditors thereof and additional reasons were stated as follows:

“(a) That after the trustee shall deduct from said \$198,000.00 the cost of removal of said tanks and equipment, and the commissions (if any) and the expenses of sale, and the Federal and State Income Taxes, necessarily arising from such sale which taxes cannot be definitely determined at this time because of the uncertainty as to the actual cost of removal of said tanks, and equipment, but which are substantial, the net sum remaining will be so small that the loss of this valuable six acres of waterfront property, coupled with the possible loss of all of the oil yet to be produced therefrom, will be entirely without justification; (19)

- “(b) That the Debtor’s ability to rehabilitate himself by a plan of reorganization, now under way with the aid and co-operation of a number of his important creditors, will in no way be aided by such an insignificant sum of money but will on the contrary be delayed and possibly defeated as shown in the next succeeding paragraph;
- “(c) That if hereafter the said trustee as Lessor and Universal Consolidated Oil Company as Lessee desired to extend the term of said lease or to modify said lease for their mutual gain and advantage they would be totally unable to do so without the consent of said proposed purchaser, and it should be self-evident that such consent would be withheld. The legal question that arises under such consideration has possibly been decided in an oil and gas case by the Supreme Court of Oklahoma and the precise question has recently been placed before the California Supreme Court, which Court has referred the matter to the District Court of Appeal for the Fourth District for decision.” [Tr. pp. 17-18.]

Said objectors concluded with a recital of proceedings in reference to a \$400,000 loan and a \$75,000 credit, as part of a plan of reorganization. [Tr. pp. 18-19-20.]

The written objections filed by Ruby E. Neblett, as the equitable owner of certain corporate stock of the bankrupt, after adopting the said objections of appellees [Tr. p. 21], set forth further objections as follows:

“2. The record does not indicate that a sufficient public advertisement of the sale of the property has been made to enlist the interest of proposed buyers able and willing to purchase land of the character proposed to be sold.

“3. The contemplated sale price of the property does not appear to be its fair market value in view of the statement of the Trustees herein, made by written communication to the referee herein, (24) dated July 2, 1947, to the effect that the Trustee was asking \$374,000.00 for the Wilmington property.

“4. The terms of the sale, in imposing upon the Trustee the obligation to remove the obstruction upon the property, would create a possible liability for damages incurred in the operation and doubt may exist as to the extent of the power of the Trustee to engage in such operation.” [Tr. p. 21.]

As hereinbefore stated, and as shown by the Findings of Fact made by the referee [Tr. pp. 26-35], Bank of America National Trust and Savings Association, “. . . a secured and unsecured creditor” [Tr. p. 26], appeared through its counsel, Edmund Nelson, Esq., and after examining the said written objections of appellees and of the said Ruby E. Neblett, “. . . in open court, joined in said written objections.” [Tr. pp. 26-27.]

Security-First National Bank of Los Angeles, the secured creditor, appeared at said hearing and filed a memorandum stating its approval of the proposed sale, and stating that of the indebtedness of \$1,351,729.38 due it on the day of adjudication of bankruptcy that all had been paid but the sum of \$320,222.85 (thereby acknowledging the receipt from the trustee of principal payments alone in excess of \$1,000,000.00) but complaining that during the year 1946 and during 1947 to the date of said hearing that it had been paid \$83,485.58, of which somewhat less than one-half were from payments made by said trustee from his income from oil and the remainder from the disposal of other assets. [Tr. pp. 22-25.]

The Hearing Before the Referee.

On November 13, 1947, the first day of the hearing before the referee, appellees called HARVEY C. HIGGINS, who testified, in part, that he had been "Land appraiser for Southern Pacific Company . . . since 1922" [Tr. p. 100]; that he had been recently transferred to San Francisco ". . . to take over the land and appraising of the entire Southern Pacific Company" with the title "Engineer and Land Evaluation" [Tr. p. 100]; that since 1922 he had appraised ". . . over a hundred million dollars worth of property for said company, including waterfront lands at San Francisco, Oakland, Portland, San Pedro and Long Beach" [Tr. p. 101]; that he had also made appraisals of like property for A. T. S. F. Railway Company of the value of "about twenty million dollars" [Tr. p. 101]; that Southern Pacific Company was the owner of 31.86 acres of land adjoining said six acre parcel owned by the said trustee [Tr. p. 101]; that he had appraised said six acres on January 30, 1946, as having a value of \$359,436.00 [Tr. p. 102]; that in his opinion that was the value of said parcel as of November 13, 1947 [Tr. p. 103]; that he had appraised said 31.86 acre parcel about six months before as having a value of ". . . \$60,000.00 an acre (is) for surface rights only for industrial purposes" and did ". . . not include the minerals" [Tr. p. 104]; that said lands were the "same value" as those of the estate [Tr. p. 105] and that said appraisal of \$359,436.00 was for "the surface rights only for industrial purposes" [Tr. p. 105] and did "not include minerals." [Tr. p. 105.]

Upon the second day of the hearing before the referee the said trustee, in open Court, offered said property for sale to the general public. [Tr. p. 112.]

Thereupon H. F. METCALF, the said trustee, testified, in part, as follows:

That he had received an offer from a construction company to perform the oil equipment removal required of him under one of the conditions of appellant's offer of purchase, for the sum of \$20,378.00; that he had advertised the six acre parcel for sale in January, 1946 [Tr. p. 123]; that he had not advertised the property “. . . in regard to this proposed sale” [Tr. p. 124]; that he had placed an advertisement in a Long Beach paper during 1947 but that was “. . . six or eight months ago” [Tr. p. 124]; that he obtained results therefrom. [Tr. p. 124.]

During the course of Mr. Metcalf's testimony an appraisal previously made by Thomas J. Cunningham of said six acre parcel, in the sum of \$211,462.00, was admitted in evidence by referee. [Tr. p. 117.] While it was being offered, some discussion took place as to when it was made, the referee recalling that it was “approximately a year ago” [Tr. p. 116]; L. M. Cahill, attorney for certain objectors, stated that “it will be about two years next January” [Tr. p. 117] and Mr. Lynch, attorney for the trustee, stating that the thought “. . . that the actual appraisal was made in December, 1945.” [Tr. p. 117.]

Thereupon the following took place:

“Mr. Cahill: Your Honor is advised written objections have been filed *in* (by) my office on behalf of certain creditors (26) of the bankrupt.

Mr. Lynch: The burden of proof is on the parties objecting.

Mr. Nelson: I would like to ask for a stipulation that the Bank of America may rely on the written objections filed by Mr. Cahill.

The Referee: You want to join in with them?

Mr. Nelson: Without filing separate objections.

Mr. Lynch: I have no objection." [Tr. p. 117.]

H. V. JOHNSON, called as an expert witness on behalf of appellees, testified that he had been an appraiser of lands and improvements thereon for 25 years [Tr. pp. 126-127]; that he had made important and extensive appraisals for Security-First National Bank of Los Angeles [Tr. pp. 126-127], for Building and Loan Associations [Tr. pp. 127-128], for Title Guarantee and Trust Company, as its chief appraiser for eleven years [Tr. p. 129], for the State of California [Tr. p. 131], for the United States Government [Tr. pp. 132-133], and for many others.

He stated that in his opinion the fair market value of the property was the sum of \$419,571.00. [Tr. p. 134.]

ROY G. MEAD, called as an expert on behalf of appellees, testified that he was a Consulting Engineer and Geologist; that he had been so engaged as such for 26 or 27 years after graduating from the University of Arizona, where he took honor degrees in geology and mining engineering [Tr. p. 163]; that for the past 25 years the major part of his work had been ". . . on oil geology in the various fields of California, and particularly in the Los Angeles Basin" [Tr. p. 163]; that he was familiar with the practice in producing oil wells and the practice in reference to the owner of the lands upon which oil wells are located [Tr. pp. 163-164]; that he had made appraisals of oil properties for numerous major and independent oil companies which he named [Tr. pp. 164-165], and for the United States Government as a field examiner

for the United States Land Office [Tr. p. 165]; that he had been employed by the United States Government within “. . . the last two or three years . . . on a case involving oil prices, in the Kettleman Hills oil field” [Tr. p. 165]; that he had been employed by the State of California [Tr. p. 165]; that he made appraisals for inheritance tax purposes “. . . both for the royalty owner and the operator” [Tr. p. 165], and that he was familiar with the said six acre parcel.

After a recital to him of certain of the pertinent facts of the proposed sale to appellant [Tr. p. 167], he was asked this question by counsel for appellee:

“Having these facts in mind, I will ask you if, in your opinion, such a proposed sale with such reservation is regarded as sound practice on the part of the land owner.” [Tr. p. 167.]

After objections were overruled, he replied as follows:

“A. As I understand the question and the explanation, answering the question, *I would say it would not be, because the oil interest would be jeopardized and the owner of the property, who now has the property, would not get the oil rights after the expiration of the present lease.*” [Tr. pp. 167-168.] (Emphasis added.)

After some discussion, the following took place:

“By Mr. Cahill:

Q. That is the fact. That being the fact, what, in your opinion, is the danger of the Trustee in Bankruptcy in selling this asset in this manner? A. He would lose the protection that would run to the landowner in the event the lease was terminated.

Mr. Lynch: There is no question about that.

The Witness: *Therefore the value would be lower.*" [Tr. p. 168.] (Emphasis added.)

"By Mr. Cahill:

Q. Because of that factor is it true that those who would purchase, and that a sale not having been made—the proposed sale—the interest in the oil from the Trustee, will they pay, in your opinion, a lesser figure if the sale is consummated on that basis?" [Tr. p. 168.]

Following some discussion between the referee and counsel, the question was explained as follows:

"Mr. Cahill: I will put it this way:

Q. The estate today has certain interests—it is the owner of the minerals, subject to a certain executed lease. If those minerals were offered on the market today they would bring a price, which we will indicate as X price. Now, query: If this sale is made so that the Seller, the Trustee in Bankruptcy, no longer owns the minerals in place, but he simply owns an interest under an oil and gas lease, will the buyer who would have today paid X price be only willing to pay then a day after the sale takes place, Y price, presumably a much lower price?" [Tr. p. 169.] (Emphasis added.)

After some further discussion, the referee said: "He can answer." [Tr. p. 169.] Mr. Mead then answered as follows:

"The Witness: Yes, I would say he would. It is a case where you are a direct royalty owner and after the sale there would be an over-riding royalty which would be affected by the lease." [Tr. p. 170.]

In an endeavor to establish the extent of the detriment caused thereby, the following questions were asked and the following answers given:

“By Mr. Cahill:

Q. In your opinion, would his selling price, over-riding royalty, be much lower than the interest we have today? A. Yes.

Q. Would you have any idea what percentage, approximately? A. Well, that would vary with conditions. It might be the same in some cases, and in other cases it might be 50 per cent lower. In order to tell exactly what that would be you would have to make an appraisal of the oil and ascertain how much oil would be recovered after the lease was terminated. I would say it would be, at least, 25 per cent less.

Q. In your opinion, the value the Trustee has today would be depreciated about 25 per cent through making this sale in the manner that it is proposed to be made with the reservation only as to our interest under the lease? A. That is just an opinion, but it could be verified (93) by an appraisal of the oil rights.

Q. Have you found in your experience that oil royalty buyers will pay less, substantially less, where what they are buying is only an over-riding royalty under a lease? A. No, they don't pay as much landowner royalty where lower rights run, when the land is more desirable than the over-riding royalty. That depends upon the terms of the contract.

Q. The reason why— A. The landowner royalty runs with the property. If a lease is terminated the landowner still has the mineral rights, and he can either operate the property himself or he can lease

again. In the case of over-riding royalty, when the lease terminates, that mineral right is lost and ceases to be.

Mr. Cahill: That is all." [Tr. pp. 170-171.]

Following Mr. Mead's testimony, considerable discussion took place before the referee in reference to obtaining the testimony of Mr. Albert A. Carrey, who had been called by appellee at an earlier day but who had not been heard and was absent from the district on the day that Mr. Mead testified. [Tr. pp. 172-173-174.] It was pointed out by Mr. Edmund Nelson, on behalf of objector Bank of America, that Mr. Carrey's testimony was of extreme importance for the reason (as stated by Mr. Nelson):

"Mr. Carrey has testified in this matter before, as a geologist, and he is the adviser of the Trustee which (he) had been through the proceeding. I think he is better informed than anyone else about the conditions here, geologically and otherwise." [Tr. p. 174.]

After further discussion it was decided to endeavor to have Mr. Carrey present on a subsequent day and that if he could not attend that a statement would be obtained from him in writing as to his opinion as to the proposed sale and that said statement would, by stipulation, be placed in evidence.

The initial testimony of ALBERT A. CARREY was presented to the referee on November 26, 1947, in the form of a letter which was, pursuant to stipulation, received in evidence. The stipulation was to the effect ". . . that if Mr. Carrey were called at (the) this time, sworn and testified as a witness, that he would testify as set forth in (the) this letter." [Tr. p. 195.] The letter so received

in evidence was on the printed stationery of "A. A. Carrey, Petroleum Geologist and Engineer," was dated November 17, 1947, and was as follows:

"Mr. L. M. Cahill, Attorney at Law,
"606 South Hill Street,
"Los Angeles, California.

"Dear Mr. Cahill:

"The petition of H. F. Metcalf, Trustee, for (120a) the sale to the Procter & Gamble Manufacturing Company of certain properties located within the Wilmington oil field has been brought to my attention. Said property is owned by the F. P. Newport Corporation and is at present leased and operated for oil by the Universal Consolidated Oil Company.

"I have been requested to study said petition and render any opinions that I might have insofar as said sale might affect the present and future economical operation of the wells now located on the property.

"I shall only attempt to base my opinion upon good oil field practice and the matter of operating leases. By way of qualification I might state that I have been actively interested in the oil business for 25 years, as a consulting petroleum geologist and engineer for 20 years, and more particularly I have been the field agent for the trustee, Mr. H. F. Metcalf, in connection with this particular property for approximately nine years.

"As a result of that experience I have had occasion to study the original lease many times and feel that I am familiar with the operations in so far as they affect this particular property. (121)

"From a study of paragraph B of the above-mentioned fee, it appears to me that the sale of this prop-

erty would change the present landowners' position in that the Newport Corporation would be the owners of a so-called 'over-riding royalty,' rather than as present they are the owners of the mineral interest. Said sale would in a sense convert present oil and gas lease into a restrictive lease, in which case the termination period would be of prime importance. Such a restricted lease might preclude the possibility of the Newport Corporation operating the wells themselves some time in the future.

"In explanation of the above statement, it will undoubtedly come to pass some time in the future that the present operating company might feel that it is no longer profitable for them to operate under said lease. In such cases it has been found that the fee owner can often operate such leases where an operating company, which has to pay high royalties, cannot do so.

"It is my opinion that if this sale is made that the present landowner, the F. P. Newport Corporation, will suffer a decided loss in the sale value of their landowner's interest. It has been my experience that there are few buyers (122) for over-riding royalties, as most royalty buyers prefer mineral interests. In each case where I have observed sales, it has been my experience that over-riding royalties always bring considerably smaller prices than landowner's royalties or mineral deeds.

"I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is in the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has no power to prevent the present operating company from terminating said lease, and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.

"In answer to paragraphs C and D, I do not believe that the changes in the physical equipment on the leases particularly work any hardships on an operating company. It may to some extent limit their freedom in the matter of remodeling work and the handling of oils from the various wells, but I do not believe it will be serious enough because too great inconvenience.

"Hoping the above information will be of some assistance in clearing up some of the points in connection with said sale, I remain, (123)

"Very truly yours,

"(Signed) A. A. CARREY."

Subsequently, A. A. CARREY was called as a witness and gave testimony on behalf of appellees and he stated in part as follows: that he was a consulting geologist, petroleum engineer, and that he also operated an oil company [Tr. p. 247]; that he had been so engaged since his graduation from Stanford University in the Department of Geology, in the year 1922 [Tr. p. 247]; that he had been employed by various oil companies as geologist or chief geologist and that for most of the time "for a company that is now the Texas Company" [Tr. p. 247]; that he had been employed by the said trustee in the Newport matter as petroleum engineer for a number of years and that he was thoroughly familiar with the oil wells upon said six acre parcel and with the production zones underlying same [Tr. pp. 248-249-250]; that in his opinion an unproduced oil zone, known as the "Ford Zone" existed beneath said six acre parcel [Tr. pp. 251-253-255]; that in his opinion a still lower and unproduced horizon existed beneath said six acre parcel, as to which there existed ". . . a fair chance of production." [Tr. p. 257.]

ROY G. MEAD was recalled and gave further testimony. He stated that he was present at the hearing at which time Mr. Carrey testified and at the time that another expert, a Mr. Follansbee, testified. [Tr. p. 264.] The following then took place:

“By Mr. Cahill:

Q. After having heard the testimony of those two experts, do you remain of the opinion that as to this 6 acres, that the Ford Zone lies thereunder? [209]

A. Yes, I am still of that opinion.

Q. And that there might be a possibility of profitable production from that zone? A. Yes, that is my opinion. I wouldn't know how much production, but there is a possibility of some production in my opinion.

Q. Do you also have an opinion at this time after having heard their testimony in reference to the possibility of production from the 237 Zone? A. I am of the opinion that the 237 Zone lies under this property as well as the Ford Zone.

Q. Do you think that the production might be profitable from that? A. It might be more profitable in the 237 Zone than the Ford Zone.

Q. Do you think that both those zones should be drilled in and tested by production tests? A. By all means I do.” [Tr. pp. 264-265.]

THOMAS F. MASON, produced by and on behalf of the secured creditor, testified: that he was a realtor and appraiser and had been so engaged since 1923 [Tr. p. 178]; that he had appraised property for the County of Los Angeles, State of California, United States Army, banks and others and that he had appraised much beach property in Los Angeles and Orange counties, including the hold-

ings of the Harbor Department of the City of Los Angeles [Tr. pp. 178-179]; and that in his opinion “. . . the fair market value of the surface rights only of the (this) property under discussion here is \$196,350.00, as of the date of this trial.” [Tr. pp. 178-179-180.]

G. F. FOLLANSBEE, JR., the Vice President of said Universal Consolidated Oil Company, called as a witness for and on behalf of said trustee, testified as follows: that he was such officer of said oil company [Tr. p. 223]; that he was an engineer, having graduated from Stanford University with an A. B. in Geology, following which he took one year's graduate work in petroleum engineering [Tr. p. 223]; that he had been employed by the California State Division of Oil and Gas as an engineer and that he had been with said oil company 19 years as an engineer and geologist [Tr. p. 223]; that he was familiar with a deepening operation on one of the wells producing on said six acre parcel [Tr. p. 224]; that cores were taken and that “. . . there was some fair looking sand which we were undecided upon at the time” [Tr. p. 224]; that after giving the matter some consideration and “running the log” it was his opinion that a commercial well could not be obtained in that portion of the Ford Zone [Tr. p. 224]; that the well deepened had not at any time been a very good producer [Tr. p. 226]; that although the sand located in that portion of the Ford Zone “. . . was fair looking sand” [Tr. p. 227], that “no tests were run” [Tr. p. 233]; that the 237 Zone had not been discovered in the general area at the time of such drilling and that his company did not drill down to where it might have been [Tr. p. 233]; and that, following said deepening, “. . . there was no production test attempted of any kind either with or without casing.” [Tr. p. 234.]

CLARK C. BURGESS, called as a witness on behalf of appellees, gave testimony as follows: that he was a realtor, so engaged at Long Beach, California, since 1934 [Tr. p. 238]; that he was familiar with waterfront property in that area and that he had recently been successful in negotiating leases of waterfront property in that area [Tr. pp. 238-239]; and that in his opinion the said six acre parcel, with which he was familiar, was salable “. . . in the neighborhood of some sixty to sixty-five thousand dollars an acre.” [Tr. p. 240.]

F. P. NEWPORT, President of the bankrupt corporation, gave testimony as follows: that he was a real estate broker and appraiser and had been engaged as such in California for over 40 years [Tr. p. 278]; that he had made appraisals in the District Court of the United States and in the Superior Court of the State of California and that he was then acting as appraiser for the Federal Court, which was referred to as “Mr. Laugharn’s court” [Tr. p. 278]; that he had purchased said six acre parcel on February 13, 1913 and had been familiar with it at all times since [Tr. pp. 278-279]; that he had been familiar with the sale of property, particularly water front property in the Long Beach harbor area, over a period of 30 years and that in his opinion the fair value of the surface rights of said six acre parcel was in the sum of \$391,000.00 [Tr. p. 279]; that he had determined that he could obtain a loan from California Western States Life Insurance Company in the sum of \$400,000.00 as part of a plan of reorganization [Tr. p. 281]; and a credit in the sum of \$75,000.00 as part of said plan. [Tr. p. 283.]

R. T. ADAMS, Assistant Vice President of Security-First National Bank of Los Angeles, the secured creditor, called on behalf of said bank, gave testimony as to the balance of principal due to said bank. [Tr. pp. 287-289.]

J. B. GRIBBLE, called as a witness on behalf of appellees, testified that he was the auditor employed by said trustee [Tr. p. 276]; that he had made a calculation that, after deducting the cost of removing the tanks and other equipment from said six acre parcel, which cost was in the sum of \$20,378.00, that of the balance remaining after deducting said sum from the \$198,000.00 price offered by appellant there would be left a sum as to which the trustee would be required to pay an income tax in the sum of \$20,761.18. [Tr. pp. 276-277.]

The Order of the Referee.

On December 19, 1947, the referee made his order upon said petition and the said objections thereto. The order embodied certain findings, none of which were upon the issues raised by said petition and the objections thereto except the statement in the nature of a conclusion of law "that the objections, and each of them, made to said sale are without merit" [Tr. p. 29], and except a statement that a plan of reorganization had not been presented and that a loan of \$500,000.00 would not be sufficient to pay the creditors of the estate plus the expenses of administration [Tr. p. 29] and except a brief recital in reference to the undeveloped oil zones, which was simply to the effect that ". . . it is not now known whether or not oil and gas could or can be produced in commercially profitable quantities . . ." [Tr. p. 29.]

The findings were silent as to the several issues raised that the proposed sale with the conditions demanded by appellant attached would be detrimental to the estate and cause tremendous loss and depreciation as to the remaining assets, and no finding was made whatsoever as to the fair market value of the property, the referee in that regard simply noting that the property had been appraised by “. . . Thomas Cunningham, appointed by this court for said purpose,” at \$211,462.00, without noting, however, the time that said appraisal was made. [Tr. p. 28.] As hereinbefore shown, the record discloses that Mr. Cunningham’s appraisal had been made almost two years prior to the date of said findings.

On December 29, 1947, appellees filed with said referee their petition to review the referee’s said order. That after a recital therein of the objections of appellees, of Bank of America National Trust & Savings Association, and of the said Ruby E. Neblett, appellees set forth in 12 subparagraphs of paragraph “IX” thereof their reasons why they believed that said order is erroneous. [Tr. pp. 41-46.] That said paragraphs constituted an assignment of errors which have been hereinafter referred to under point “IV” of the argument. As all of said paragraphs are fully set forth in the appendix attached hereto, they will not be further discussed at this place. Paragraph “XI” of said petition was as follows:

“That no findings of any kind have been made upon the principal objections set forth in said written objections, your petitioners must therefore request that a transcript be prepared to include all matters received in evidence at said hearings, with the exception of the matters received by reference.” [Tr. p. 27.]

Referee's Certificate on Review.

Said certificate was prepared prior to the completion of said transcript and reflects the difficulty, and almost the impossibility, of attempting to prepare from memory an accurate record of a summary of the evidence even though only a little over a month's time had elapsed following the hearing.

The Proceedings Before the District Court.

On March 11, 1948, transcript of the proceedings before the referee then being available, the District Judge announced during the course of the proceedings “. . . in any event I am going to have to go through this transcript” [Tr. p. 397], and the record discloses that shortly thereafter the following took place:

“The Court: I have got to read this evidence. I have got to investigate this record made before the referee.” [Tr. p. 397.]

Thereafter, and at the close of the hearing on that day, and after the Court had announced that the matter would be continued to April 26, 1948, the Court said:

“I am going to read this record between now and then, even though I have a pretty good idea of what it is already. Following that we can then dispose of the matter.” [Tr. p. 421.]

On March 19, 1948, the District Court made its order postponing the matter until April 26, 1948, for “. . . further consideration of said matter and the hearing of

further arguments therein" [Tr. p. 64] and for the purpose of considering any additional bids that might be received in the interim. [Tr. p. 64.]

The order which is appealed from hereunder was made on May 10, 1948. It embodied certain findings which the Court stated that it made after considering the further evidence placed before it and after examining and considering the said petition for review, the referee's certificate on review,, the amendment thereto, and the ". . . transcript of the record of the proceedings before the referee . . ." [Tr. p. 93.]

As to the danger of detriment and loss to the estate because of the conditions attached to said proposed sale to appellant, the Court found

" . . . that the terms and conditions imposed upon the Trustee and upon the within Estate, by said Company, as terms and conditions of said sale, were and are detrimental and injurious to the within Estate and to the best interests of the creditors thereof . . ." [Tr. p. 93.]

As to the adequacy of the price offered by appellant, the Court said:

" . . . that the consideration offered by said Procter & Gamble Manufacturing Company for said real estate in the sum of \$198,000.00, less the cost of removing said oil well equipment, and payment of other costs and if allowed the payment of the alleged commission was a totally inadequate price for said real estate . . ." [Tr. p. 93.]

As to the payment of the real estate broker's commission in the sum of \$5,000, the Court found

“ . . . that the referee was acting beyond his jurisdiction in ordering the payment of said real estate broker's commission and that its payment under the circumstances shown would have been unauthorized and contrary to law . . . ” [Tr. pp. 93-94.]

Finally, the Court made a general finding

“ . . . that many of the objections presented in writing to the referee at the hearing before him were serious objections that should have been sustained by him, and that a confirmation of said sale should not have been made by the referee herein . . . ” [Tr. pp. 93-94.]

Said order directed that the said order of the referee be reversed, vacated and set aside. [Tr. p. 94.]

ARGUMENT.

I.

The Order of the District Court Appealed From Was One in Its Discretion and Having Exercised That Discretion by Disapproving the Sale of the Property to Appellant, Such Order Should Not Be Reversed on Appeal.

That such is the rule readily appears from the decision in *Curriu v. Nourse*, 8 Cir., 66 F. 2d 137, cert. denied 294 U. S. 729, where the court first states the reason for the rule as follows:

“The approval of a sale of a bankrupt’s property is peculiarly a matter for the court of bankruptcy, and one with respect to which this court should not and will not substitute its judgment for that of the lower court.”

The court then proceeds to state the rule as follows:

“An appellate court is precluded from revising the exercise of discretion in setting aside a judicial sale by a court having equitable jurisdiction, unless there is an abuse of power, or the case is in other respects extreme. *In re Shea* (C. C. A. 1), 126 Fed. 153, 156; *In re Wolke Lead Batteries Co.* (C. C. A. 6th), 294 Fed. 509, 511; *Century Motor Truck Co. v. Noyes* (C. C. A. 1), 18 Fed. 2d 546, 547. *The same rule would apply in the proper exercise of discretion in confirming a sale.*” (Emphasis added.)

Curriu v. Nourse, 8 Cir., 66 F. 2d 137.

II.

Appellant Has in Error Assumed That the Proposed Sale Was "Confirmed" by the Referee's Order, and That Thereafter the Rule Relative to the Stability of Judicial Sales and the Rule Relative to the Setting Aside of "Completed" Sales Only Upon Certain Grounds, Have Full Application.

Appellant relies upon the early case (1914) of *In re Burr Mfg. & Supply Co.* (C. C. A. 2), 217 Fed. 16 (Appellant's Op. Br. pp. 24, 25, 26) and cases which have followed the general rule stated therein, which rule has, however, been repeatedly held not to have application to the approval or disapproval of a sale in bankruptcy until, following action by the referee, the District Court acts upon the matter.

In *Reid v. King*, 4 Cir., 145 F. 2d 868, the Court, in effect refusing to follow the *Burr* case, said:

"The courts have not always borne in mind the important distinction between setting aside a completed sale and refusing confirmation of a sale which has been made subject to the approval of the court. *Morrison v. Burnette*, 8 Cir., 154 Fed. 617, 624; *In re Burr Mfg. & Supply Co.*, 2 Cir., 217 Fed. 216, 219; and the importance of a substantial offer at an advanced price after a sale has taken place, but before it has been confirmed, has not always been recognized. For example, in *Sturgiss v. Corbin*, 4 Cir., 141 Fed. 1, the alleged inadequacy was so slight that the court would have been justified in confirming the sale without reference to the gross inadequacy rule."

The case of *Sturgiss v. Corbin* there distinguished is a case also relied upon by appellant. (See App. Op. Br. pp. 38 and 39.)

It has been held that the successful bidder, under circumstances such as shown here, is not a purchaser and is not even vested with an equitable title until the said is confirmed. We quote as follows:

“While the highest bidder of property offered for sale by a trustee in bankruptcy is entitled to have his bid accepted by the trustee and reported for confirmation (*In re Williams*, 197 Fed. 1, 116 C. C. A. 523), yet he is not a purchaser, and is not vested thereby with even an equitable title in the property until the sale is confirmed.” *In re Wolke Lead Batteries Co.*, 6 Cir., 294 Fed 509, 510.

III.

The District Court, as a Court of Bankruptcy, Was Vested With Discretion to Review and Reverse the Order of the Referee Confirming the Sale.

In declaring that rule the court, in *In re Wolke Lead Batteries Co.*, 6 Cir., 294 Fed. 509, 510, also refused to follow the *Burr* case and distinguished it as having no application to facts existing there, which facts, while not identical, are similar in many important aspects to those here. The court said:

“After a judicial sale has been confirmed by the court, and the equitable title has thereby vested in the purchaser, public policy requires that there should

be stability in such sales, and that the same should not be set aside, except for reasons for which equity should set aside a sale between individuals. *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 113 C. C. A. 126. The facts disclosed by this record differ materially from the facts upon which the court based its opinion in *Re Burr Mfg. & Supply Co.*, *supra*. In the latter case the District Court had approved and confirmed the sale, thereby vesting in the bidder an equitable title in the property. Some time later the District Court entered an order vacating its former order approving and confirming the sale.

“In the instant case *the order of the referee confirming the sale to Haag was subject, in due course of procedure, to review by the District Court. That court was vested with discretion to review and reverse the order of the referee in refusing to confirm the same.* The reversal by the District Court of the order and decree of the referee approving and confirming the sale to Haag left him in exactly the same situation in which he would have been placed if the referee had refused to confirm the sale.

“The District Court having exercised its discretion in that behalf, this court will not reverse, except for an abuse of discretion. *Bryant v. Stockhausen Co.* (C. C. A.), 271 Fed. 921.”

In re Wolke Lead Batteries Co., 6 Cir., 294 Fed. 509, 511.

IV.

The Discretion Exercised by the District Court in Electing to Review and in Reviewing the Referee's Order Was Eminently Proper, Thoroughly Sound and Quite Necessary in Order to Protect the Estate From a Heavy and Needless Loss.

Of the numerous issues raised by the trustee's said petition and the objections thereto of appellees, Bank of America National Trust and Savings Association and the said Ruby E. Neblett, the referee, by his findings, did not decide any of them except, inferentially by the general finding in the nature of a legal conclusion: "That the objections, and each of them, made to said sale are without merit" [Tr. p. 29], and by a finding that ". . . it is not now known whether oil and gas could or can be produced in commercially profitable quantities from any undeveloped strata or zones which may underlie said real property" [Tr. p. 29], and a recital that a plan of reorganization had not been submitted, and that a loan of \$500,000.00 would not be sufficient to pay both the creditors and the expenses of administration.

Upon the petition of appellees for review of the referee's order made upon such findings, the District Court was confronted with the fact that, in the absence of a specific finding as to the danger to the estate of the proposed sale because of the conditions attached to same by appellant, or of the impropriety of said sale because of the other grounds of objection made by appellees and others thereto, that it was necessary for it to take further evidence, to read the entire transcript, and to otherwise become fully advised in the premises, and, thereafter, to make appropriate findings. The District Court was at the outset unable to determine from the findings made by the referee even his conclusion

of the fair market value of said six acre parcel, although expert appraisers had testified for several days upon that matter. The referee in that regard only noted that the said six acre parcel had been appraised, by an appraiser appointed by the Court, as having a value in the sum of \$211,462.00; but, by naming the appraiser, it became apparent, as shown by the discussion between the referee and counsel, when his appraisal was placed in evidence, that such appraisal was made at a time nearly two years earlier.

Possibly no argument made under this point can exceed in power appellees' Assignment of Errors presented to the District Court as a part of their Petition to Review the Referee's Order. By reference they are hereby made a part hereof and for the convenience of this Honorable Court paragraph "IX" of said Petition to Review, which paragraph contained all of said Assignment of Errors, has been printed in the appendix hereto.

The District Court, on the contrary, after receiving further evidence, made its order which, in part, recited that the Court having considered same, and examined the Petition to Review, the Referee's Certificate, the amendment thereto, "and having examined the transcript of the record of the proceedings before the Referee" [Tr. p. 93]; caused to be embodied in said order express findings upon the said matters found upon, if at all, only inferentially by the referee.

As to the danger to the estate and to its assets because of the conditions attached to said offer by appellant, the District Court found:

" . . . that the terms and conditions imposed upon the Trustee and upon the within Estate, by said Company, as terms and conditions of said sale, *were and*

are detrimental and injurious to the within Estate and to the best interests of the creditors thereof . . .”

[Tr. p. 93.] (Emphasis added.)

The testimony of witnesses Mead and Carrey fully sustain such finding and no evidence was offered or received to the contrary. Their testimony has been partially reviewed herein under the heading “Statement of the Case.”

As to the adequacy of the price bid, the Court said:

“ . . . the consideration offered by said Procter & Gamble Manufacturing Company for said real estate in the sum of \$198,000, less the cost of removing certain oil well equipment and payment of other costs and if allowed the payment of the alleged commission, *was a totally inadequate price for said real estate.*” [Tr. p. 93.] (Emphasis added.)

While the evidence was conflicting as to the value of the property, it is inescapably true that of all of the five experts who testified as to value, four were of the opinion that the property was worth from approximately 80% to approximately 100% more than the value placed by the fifth appraiser.

The evidence also disclosed that the offer was not an offer of \$198,000.00 but actually an offer in an unknown sum—a sum that would be the balance remaining after the trustee engaged in the hazardous and expensive task of removing oil well tanks, pipe lines, and equipment at his own expense; and otherwise paying all of the things demanded of him by appellant as conditions attached to said offer, as alleged, of \$198,000.00.

It appeared also that whatever the actual net sum turned out to be that it was subject, in effect, to another deduction for the payment of income taxes in a sum in excess of \$20,000.00 on profit arising because of the fact that the property had been owned first by Mr. Newport and then by the bankrupt corporation for about 30 years and had greatly enhanced in value during that period.

One of the conditions imposed by appellant was that the trustee accept all cash. Most buyers are willing, even anxious, to buy for 30% or less down and give first lien paper for the balance. Such a transaction is treated so favorably by the Government that the taxpayer pays very much less income taxes.

As to the payment of a real estate broker's commission to a broker who had not been employed by the trustee and who had no knowledge whatsoever of his claim for a commission, the District Court found:

“ . . . that the Referee was acting beyond his jurisdiction in ordering the payment of said real estate broker's commission, and that its payment under the circumstances shown would have been unauthorized and contrary to law.” [Tr. pp. 93-94.]

This matter will be discussed at some length under the next succeeding point.

The District Court also found generally

“ . . . that many of the objections presented in writing to the Referee were serious objections that should have been sustained by him . . . ” [Tr. p. 94.]

V.

It Is No Longer the Law That Confirmation of a Sale in Bankruptcy Should Not Be Refused Unless the Inadequacy of Price Alleged Is So Great as to Constitute a Fraud or Shock the Conscience, or Unless Accompanied by Unfairness, in at Least Some Slight Degree, by the Purchaser.

What appears to be the latest comprehensive statement in this regard is found in *Reid v. King*, 4 Cir., 157 F. 2d 868, 870, 871, from which we now quote as follows:

“We are urged to reject these conclusions on the ground that confirmation of a judicial sale, even in bankruptcy, should not be refused for inadequacy of price, unless the price is so grossly inadequate as to raise a presumption of fraud or shock the conscience, or unless the inadequacy is great and is accompanied by circumstances of unfairness on the part of the party benefited. Authorities in this circuit and elsewhere are cited in support of the rule: *Sturgiss v. Corbin*, 4 Cir., 141 F. 1 (denial of confirmation on appeal reversed); *Jacobsohn v. Larkey*, 3 Cir., 245 F. 538, L. R. A. 1918C, 1176 (denial of confirmation on appeal affirmed); see also *Speers Sand & Clay Works v. American Trust Co.*, 4 Cir., 52 F. 2d 831, 835; *In re Yost & Cook*, 6 Cir., 70 F. 2d 614; *American Trading & Production Corp. v. Connor*, 4 Cir., 109 F. 2d 871; 6 Remington on Bankruptcy, 4th ed. sec. 2555.

“It should be noted, however, that the phrase ‘gross inadequacy’ is of early origin and derives its authority from the procedure developed by the courts to govern execution sales and judicial sales so as to protect the interests of the parties, and especially to give stability to the sales and to encourage purchasers to bid with confidence. Kleber’s Void Judicial and Execution Sales sec. 355. The rule has been taken

over by courts of bankruptcy under a statute whose prime purpose is to dispose of the assets of the bankrupt at the highest prices obtainable in the interest of the creditors; and not infrequently the conflict between this purpose and the need to inspire confidence in sales under the supervision of the court has given rise to uncertainties which are reflected in the decisions. The courts have not always borne in mind the important distinction between setting aside a completed sale and refusing confirmation of a sale which has been made subject to the approval of the court, *Morrison v. Burnette*, 8 Cir., 154 F. 617, 624; *In re Burr Mfg. & Supply Co.*, 2 Cir., 217 F. 16, 19; and the importance of a substantial offer at an advanced price after a sale has taken place, but before it has been confirmed, has not always been recognized. For example, in *Sturgiss v. Corbin*, 4 Cir., 141 F. 1, the alleged inadequacy was so slight that the court would have been justified in confirming the sale without reference to the gross inadequacy rule.

“The result is that some inconsistency is found in the statement of the rule in reported cases, and the courts in notable instances have departed from strict adherence in the interests of the creditors, even in the absence of unfairness or impropriety in the conduct of a sale, when the trustee has received a reliable and substantial advance bid after the sale has been held. In these cases the courts have accepted such an advance bid as sufficient without the accompaniment of those ‘slight circumstances of unfairness’ which in the earlier cases, such as *Morrison v. Burnette* and *In re Burr Mfg. & Supply Co.*, *supra*, were thought necessary to justify a rejection of confirmation. . . .

“The case before us does not relate to the setting aside of a completed sale but to the confirmation of a sale made subject to the court’s approval. The

concrete problem is whether or not the bidding should be reopened to let in a substantially higher bid. We see no reason why the court in this situation should not be permitted to exercise the authority granted it by the express terms of the statute to approve or disapprove the lower bid; or why the review of its decision on the point should not be limited by the rule which commits such decisions to the sound discretion of the court. *In re Hagerstown Silk Co.*, 4 Cir., 69 F. 2d 790; *In re Wolke Lead Batteries Co.*, 6 Cir., 294 F. 509; *In re Shea*, 1 Cir., 126 F. 153. This course, in our judgment, will produce more satisfactory results than a strict adherence to a verbal rule of thumb devised long ago to govern sales in another field." *Reid v. King*, 4 Cir., 156 F. 2d 868, 871.

VI.

The Referee Was Without Authority to Order the Payment of a Real Estate Broker's Fee as the Broker Had at No Time Been Employed by the Trustee but Was, on the Contrary, a "Finder" Rendering Service on Behalf of Appellant.

While it is apparent that the broker had an oral agreement with the referee [Tr. p. 290] the indisputable fact remains that the trustee did not employ him; did not know that he was rendering services [Tr. pp. 290-291], and the broker did not have an agreement in writing for the payment of a commission, as required by section 1624, Civil Code of the State of California.

Nothing could be clearer from the record.

Creditors knew nothing of the matter until the referee announced his oral decision in open court after the submitting of the issues raised by the trustee's petition and the said objections thereto. No notice of any such claim was given to creditors by either the trustee or the referee. The said petition of the trustee was completely silent as to any such matter [Tr. pp. 7-11]; and he testified in the presence of the broker as follows:

“Mr. Metcalf: This man has never talked to me about this deal.” [Tr. p. 291.]

The trustee's quoted statement had been preceded by the statement of his attorney that follows:

“Mr. Lynch: I am not sure what the answer is, but Mr. Metcalf has not made any agreement or arrangement with anyone for the payment of any commission.” [Tr. p. 290.]

And, at the same time and in the presence of said broker, appellant through its attorney, Richard C. Bergen, made the following statement:

“Proctor and Gamble Representative: He was the finder and we have handled the negotiations from that point.” [Tr. p. 290.]

The assignment of error in reference to this matter set forth in the Petition to Review the Referee's Order, is set forth in full in the appendix herein under subparagraph “(k).” Reference is made to it and it is made a part hereof as if fully set forth here. (Appendix p. 4.)

Appellant states in his opening brief, at page 16:

“While we recognize Joseph Sattler as a ‘finder’ and think that the Referee had discretion to order the payment of a commission to him [Tr. p. 34] it is not a matter with which we are primarily concerned. Of course, if Judge Cavanagh had thought or this court thinks that the commission cannot properly be paid it is a matter for modification and not reversal.” (App. Op. Br. p. 16.)

It is quite clear that the referee has no such discretion. Research on that point discloses the following:

The referee is an office of the court exercising *judicial* functions. *In re Owl Drug Co.*, 16 Fed. Supp. 139.

The referee is merely an officer of the court of bankruptcy. *Realty Associates etc. v. O'Connor*, 295 U. S. 295, 79 L. Ed. 1446.

A referee has *no power* not conferred by the order of reference, by law or by general orders. *Weidhorn v. Levy*, 253 U. S. 268, 64 L. Ed. 898; *In re Faerstein*, C. C. A. 9th, 58 Fed. 2d 942; *In re Continental Producing Co.*, 261 Fed. 627; *In re Fox West Coast Theatres* (D. C. Cal.), 25 Fed. Supp. 250, affd. 9th Cir.; cert. denied U. S. Supreme Court; *Heiser v. Woodruff*, 150 Fed. 2d 867, cert. denied 326 U. S. 778.

A referee has no authority to collect or receive money belonging to a bankrupt estate. *In re Pierce*, 111 Fed. 516.

VII.

Creditors Are Entitled to Notice of a Claim for a Brokerage Commission.

“Moreover, the petition for the order of sale ought to have apprised the court specifically of the claim for brokerage commission.” *In re Grimm*, 35 Fed. Supp. 15, 17.

The court, in the *Grimm* case also declared:

“It is to be noted that General Order 45, 11 U. S. C. A. following section 53, provides: ‘No auctioneer . . . shall be employed by a receiver, trustee or debtor in possession except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof. . . .’ Although the foregoing relates to public sales, *no reason appears why private real estate brokers should constitute a more favored class.* The policy of the law underlying General Order 45 would seem equally applicable to the circumstances existing in the present case.”

Elsewhere the court said:

“The lien creditors were entitled to notice, before their assent to the sale was obtained, of the employment of a real estate broker and his claim for a commission from the proceeds. *Gold v. Southside Trust Co.*, 3 Cir. 1910, 179 Fed. 210, 213; Cert. denied, 1910, 218 U. S. 671. This was a relevant circumstance which might have affected their approval of the sale.” *In re Grimm*, 35 Fed. Supp. 15, 17.

Joseph Sattler, the broker claiming a commission, is licensed as such under the laws of the State of California [Tr. p. 291] and he is, as such broker, subject to the laws of the State of California, as is the trustee. Section 1624 Civil Code of the State of California is in part as follows:

“1624. What contracts must be written. *The following contracts are invalid*, unless the same, or some note or memorandum thereof is in writing subscribed by the party to be charged or by his agent:

“5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.”

Appellant has possibly accepted statements such as the following, appearing in the several letters forwarded to it by the said “finder,” as not being “puffing” but as being representations of substantial facts:

- (a) “Should then this piece of harbor land revert to private ownership, the bid that you formerly presented for this piece, I hardly believe, would be considered for the three acre piece nearby.” [Tr. p. 86.]
- (b) “If in the near future some understanding should be made between the oil company and the estate, *the price for this property, in private hands*, might be quoted around a million dollars.” [Tr. p. 86.]
- (c) “If your factory management committee would reconsider this situation *you would be the owners of a very valuable piece* of ground underpriced.” [Tr. p. 82.] (Emphasis added.)

If appellant believes those statements, it has an adequate remedy and that is to acquire the property from the trustee under a new offer, divorced from the present onerous conditons and at a price that would still be a “bargain” after a substantial increase of its present offer.

If, on the other hand, appellant does not believe said statements, and believes that it is not getting a bargain, it cannot be hurt by not acquiring property that had a value only in a sum equal to its offer.

Conclusion.

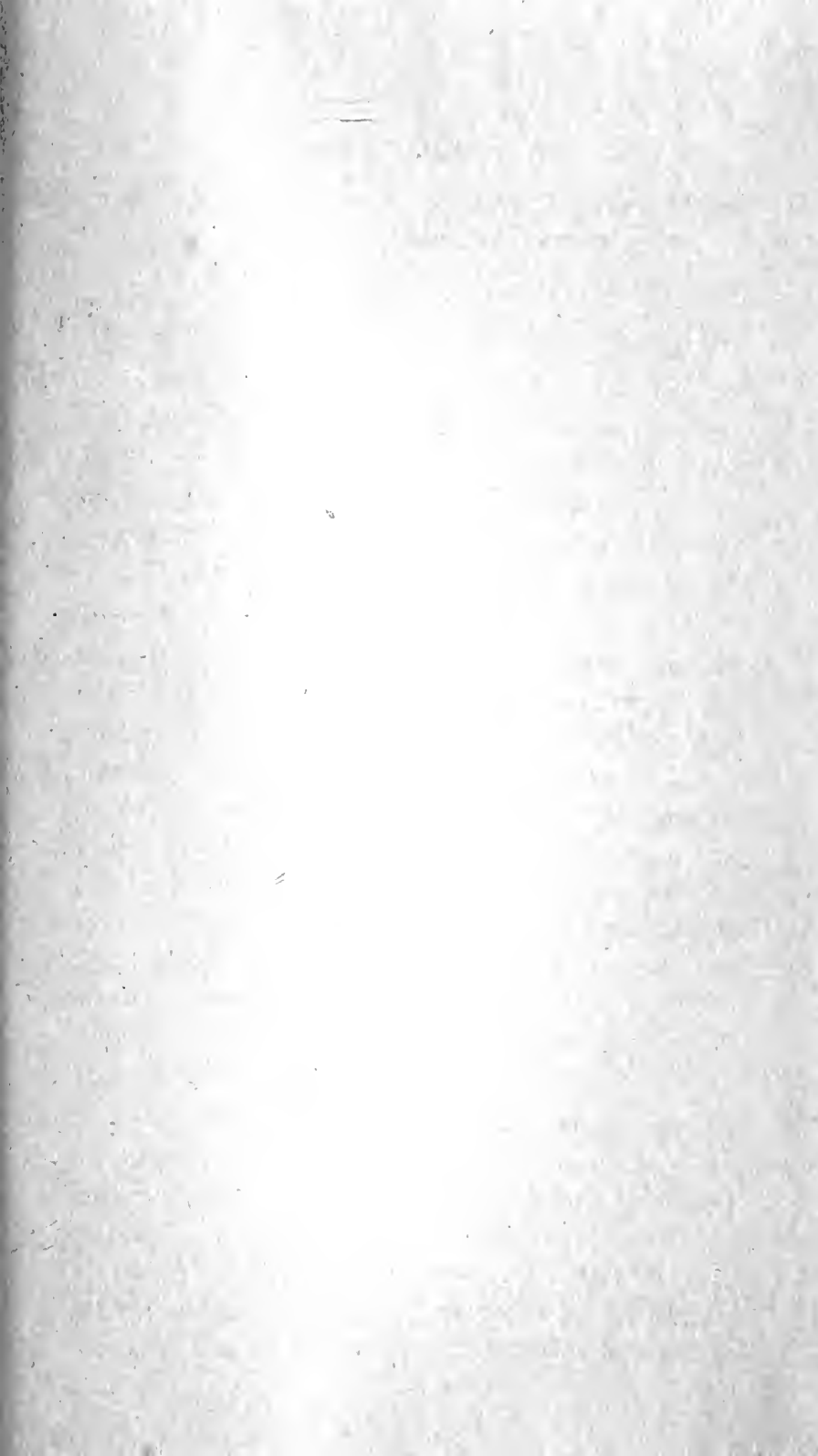
In the light of the Law and of the Facts, as stated, and because of the reasons herein set forth, the Order of the District Court should not be disturbed.

Dated: November 9, 1948.

Respectfully submitted,

LAWRENCE M. CAHILL,
Attorney for Appellees Dorothy Day, et al.







APPENDIX.

Paragraph IX of Petition to Review Referee's Order Containing Assingment of Errors.

IX.

That said order was and is erroneous in that:

- (a) It, in effect, overrules and denies all of the said objections, notwithstanding that the evidence presented and received in support of said objections not only fully supported and sustained said objections, but was practically uncontradicted as to all matters set forth in said objections with the single exception of the question of present fair market value;
- (b) That it authorizes the sale by the Trustee, over the written objections of possibly a great majority of the creditors, of a valuable asset of the within estate at a grossly inadequate price, believed by your petitioner to be approximately one-half of the fair market value of said six acre parcel, which belief is supported by the testimony of the Witness Higgins, who, as Chief valuation engineer, for Southern Pacific Company, placed a value of \$60,000 per acre upon said six-acre parcel, same being exactly the value his company had placed upon its adjourning lands which he held to be exactly comparable;
- (c) That it authorizes the sale upon the terms demanded by the purchaser in reference to the transfer of the mineral rights, whereby the trustee, being no longer the owner of the minerals in place, but having only a royalty interest therein expressly limited to the present lease, will become immediately subject to the possibility of immediate and complete loss of the

remaining oil and gas, not only as to the present producing sands, but also as to the said productive lower sands;

- (d) That said proposed sale is unwise in this, that it changes a sound business and legal relationship now existing, as to oil and gas remaining to be recovered from said lands, into an uncertain one subject not only in a certain sense, to the whim or caprice of the present lessee, but subject also to the facts that upon any day after the sale, either for a small or large consideration paid by the proposed buyer to the present lessee, or for no consideration whatsoever so paid, the Trustee can be fully and finally divested of all remaining interest in the oil and gas from said lands by the present lessee simply informing the Trustee that he has quitclaimed said lands, as authorized in said lease, or, that he has abandoned said lease in its entirety;
- (e) That all of the testimony as to present fair market value has been ignored but said order is predicated upon findings that notes only an appraisal made in either December 1945, or January 1946, whereas all of the testimony as to present fair market value disclosed that all lands in the Long Beach Harbor area have greatly increased in the two year period that followed said appraisal;
- (f) That the trustee admitted that he has not advertised the property for sale in any manner, except a brief notice in the Los Angeles Daily Journal, notwithstanding the fact, that when he did extensively advertise said property for sale in January 1945, in

newspapers in various large cities upon both coasts, that he received, in the then not nearly so favorable market, numerous inquiries from corporations, brokers and others;

(g) That as late as July 2, 1947, the trustee believed that a buyer could be secured for said six acre parcel in the sum of \$374,000.00, for as shown by the evidence he wrote the Referee herein, on that day, to that effect;

(h) That as shown by the uncontradicted evidence, the trustee will be required, under the drastic terms of sale imposed by the buyer, not only to assume the risk of damage to person and property through fire, explosion, or otherwise, through the removing of the oil tank farm equipment to lands not proposed to be sold at this time but also to pay from the funds of the within Estate the minimum sum of \$20,378.00 for such removal;

(i) That it ignores the recommendation of A. A. Carrey, who has been the petroleum geologist and engineer advising the Trustee herein, as to the oil and gas upon said lands, for a number of years; that the said lands not to be sold upon the drastic terms imposed by the buyer, as to the transfer of the mineral rights, because an immediate loss will be suffered by the Estate in the depreciation of the market value of the mineral rights. The uncontradicted testimony of Mr. Carrey on this point is in part as follows:

“In my opinion that if this sale is made that the present landowner the F. P. Newport Corporation, will suffer a decided loss in the sale value of their landowner’s interest”;

- (j) That it ignores the recommendation of Mr. Carrey that the sale be not made for an entirely different reason stated by him as follows:

“I believe that the most serious effect that the sale would have upon the F. P. Newport Corporation is the matter of the termination clause in the present lease. If such a sale is made the F. P. Newport Corporation has not power to prevent the present operating company from terminating said lease, and as a result of such action the F. P. Newport Corporation could in no way continue the oil operations.”

- (k) That it directs the payment of an alleged real estate brokers commission in the sum of \$5,000 to an attorney at law, who is apparently also licensed as a real estate broker, notwithstanding the fact that said attorney was at no time employed by the trustee herein in any capacity, attorney, broker or otherwise, and that it appears from the uncontradicted testimony that said attorney and the proposed purchaser entered into an agreement, without the knowledge of the trustee, that said attorney would be paid a “finders fee.” As such this obligation would appear to be that of the party found and not the obligation of the trustee who had no agreement in writing, as required by the laws of the State of California, with any person for his employment as a broker, or otherwise or at all.

In this regard it should be noted that the trustee herein is a licensed real estate broker, who is allowed fees from time to time for his services as trustee herein, including \$3,000 allowed him on December 23, 1947, for services rendered in 1947, and, that the record herein discloses that said trustee, about the month of January 1945, received an offer of purchase from the present proposed purchaser, for the same six acre parcel, in the sum of \$180,000, which offer the trustee declined, he then having a higher offer; and that thereafter said attorney-broker conferred with the Referee herein and asked if a commission would be paid him if he was successful in finding a purchaser for said land; and that the Referee expressed an opinion that a commission would be paid because of the fact that he did not recall of sales of real estate being made before him where some real estate broker was not paid a commission; and that thereupon the said attorney wrote a letter to the corporation whose offer had been so declined by the trustee herein, and finding a continuing interest in the property upon its part here thereupon entered into said agreement for a "finders fee." The practice of buyers employing agents to secure scarce merchandise, or to induce reluctant owners to sell real estate, has developed in this period of scarcity, but the fee to be paid therefor is a fee to be paid by the buyer for whom the service is rendered, and is never a burden to be imposed upon the seller. In

any event such fees are not contemplated by the provisions of the National Bankruptcy Act and cannot be sustained and most certainly not under the circumstances here;

- (1) That creditors herein have received no notice whatsoever as required by law of a hearing of a petition for the allowance to said attorney-broker of either a real estate commission or a "finder fee." The petition filed by the trustee herein failed to request authority to pay any such commission or fee to any person whomsoever and the notice thereof to creditors stated only the facts set forth in said petition.

No. 11962

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

Appellant,

vs.

H. F. METCALF, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

O'MELVENY & MYERS,

PIERCE WORKS,

RICHARD C. BERGEN,

HOWARD J. DEARDS,

900 Title Insurance Building, Los Angeles 13,

Attorneys for Appellant.



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Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

The only reply brief filed herein in opposition to *Appellant's Opening Brief* was filed on behalf of certain unsecured creditors of the bankrupt corporation and on behalf of the bankrupt corporation itself. Neither the Trustee in Bankruptcy nor the Bank of America National Trust and Savings Association, a substantial unsecured creditor who opposed appellant before the Referee and before the District Court, have filed briefs herein in opposition to this appeal. Accordingly, references hereinafter made to appellees or the brief filed on their behalf will have reference to appellees Dorothy Day, *et al.*

I.

APPELLEES' STATEMENT OF FACTS.

A. Appellees' "Primary" Ground of Objection.

Appellees now state that "If 'adequacy of price' were the sole or primary objection made by appellees to the proposed sale the matter would not be so serious." (Reply Br. p. 5.) Appellees apparently assert that the alleged detriment to the other assets of the estate constitutes their primary objection. This, however, does not improve their position.

The claim of detriment to the balance of the estate is based primarily on evidence that the reversion plus the royalties under the lease are of greater value than the royalties alone. This is so obvious as to require no evidence and has been conceded by appellant from the start. It amounts to a mere assertion of inadequacy of price, and it is on that basis that we regarded it in our opening brief.

If, however, we regard the detriment to other assets of the estate as being something different than an objection on the ground of inadequacy of the price, the objection is governed in any event by the same principles of law as inadequacy of price, which principles have been discussed in *Appellant's Opening Brief* and are further discussed at a later point herein.

B. The Date of the Appraisal.

At several points appellees refer to the fact that the appraisal by the appraiser appointed by the Referee was made almost two years before the sale. (See for example: Reply Br. pp. 30 and 39.) Any significance which might otherwise attach to this is nullified by the fact that appellees' own witness, Harry C. Higgins, testified that the value of the property was the same on January 30, 1946, and November 13, 1947. [Tr. p. 103.] In addition, the record does not disclose any request by appellees for a reappraisal, which would have been the proper course if appellees honestly believed there had been any substantial change in the value of the property.

C. The Real Estate Broker's Commission.

Apparently appellees do not question the proposition advanced by appellant that if any error exists in the order by reason of the allowance of a broker's commission to Joseph Sattler, it is a matter for modification and not a matter for reversal. (See: Reply Br. p. 46.) Consequently we do not wish to labor the point, but perhaps should call attention to the holding in *Aetna Casualty & Surety Co. v. Catskill Nat. Bank & Trust Co.*, 102 F. 2d 527, 530 (C. C. A. 2, 1939), where it was held that since the case was tried without a jury and the facts were fully developed, a minor error in the judgment might be corrected, and also to the enlarged jurisdiction of Courts of Appeals in “. . . proceedings in bankruptcy . . . to review, affirm, revise, or reverse both

in matters of law and in matters of fact.” (11 U. S. C. A. Sec. 47.)

Appellees' make the point that in the *Petition for Authority to Sell and Confirmation of Sale* [Tr. p. 7] “No authorization was sought for the payment of a real estate broker's commission . . .” (Reply Br. p. 8.) Appellees preface this assertion with a *partial* summary of the prayer, but neglect to mention that portion thereof praying that out of the proceeds of the sale petitioner be authorized to pay:

“(c) All other expenses incident to the consummation of said sale pursuant to said offer.”

and the prayer for general relief:

“7. For such other and further relief as may be proper.”

Under the circumstances we think there was a sufficient basis in the petition to support the order.

On this question of the propriety of payment of a commission, it should be noted that Counsel for appellees took part in the discussion of the question before the Referee but made no formal objection to the payment of a commission at that time. [Tr. pp. 290-291.]

II.

APPELLEES' ARGUMENT.

A. The Order of the Referee in Bankruptcy Was an Actual Confirmation of the Sale, and the Order of the District Court Was to Reverse, Vacate and Set Aside the Referee's Order.

Appellees make the contention in their brief that "Appellant has in error assumed that the proposed sale was 'confirmed' by the Referee's Order . . ." (Reply Br. p. 35.) However, the following references to the transcript clearly show that the Referee did in fact confirm the sale, and that the issue before the District Court was whether to affirm or reverse the confirmation, and not whether to confirm a proposed sale:

(1) On October 27, 1947, the Trustee in Bankruptcy filed a *Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Procter & Gamble Manufacturing Co., a Corporation*. [Tr. p. 7.] The prayer of the petition was, in part:

"3. That the sale of real property to Procter & Gamble Manufacturing Co., a corporation, be approved and confirmed, Subject to the conditions set forth in the offer as hereinbefore set forth." [Tr. p. 10.]

(2) On December 19, 1947, after conducting hearings on this petition over a period of several days, the Referee made his *Findings of Fact, Conclusions of Law and Order* [Tr. p. 26], and ordered, among other things, as follows:

"2. That the sale of said real property, subject to said reservations, conditions, easements, restrictions and taxes, as hereinbefore noted, to the Procter & Gamble Manufacturing Co., a corporation, for

the sum of \$198,000, be and it is hereby confirmed, subject, however, to the following additional conditions:

“(c) That this order confirming and approving this sale shall become final within sixty (60) days from October 27, 1947, provided, however, that the purchaser may waive this condition in its discretion.” [Tr. pp. 32-33.]

(3) On December 29, 1947, appellees represented by their same counsel filed a *Petition to Review Referee's Order* [Tr. p. 36], and the prayer of the petition in its entirety was as follows:

“Wherefore, your Petitioners pray for a review of said order by the Judge and that said order be vacated and set aside.” [Tr. p. 47.]

(4) On May 10, 1948, the District Court made its *Order Vacating and Setting Aside Referee's Order of December 19, 1947, re Sale of Real Property to Procter & Gamble Manufacturing Company* [Tr. p. 91], and the District Court decreed as follows:

“Now, therefore, It is Ordered, Adjudged and Decreed by the Court:

“That said order of the Referee in Bankruptcy herein, dated December 19, 1947, confirming the sale of the real property described therein, to Procter & Gamble Manufacturing Company is reversed, vacated and set aside.” [Tr. p. 94.]

The fact that the Referee had jurisdiction to actually confirm this sale, and the fact that the District Court was in a position of an appellate judge reviewing a sale already confirmed, is fully supported by the decision in *In re Realty Foundation, Inc.*, 75 F. 2d 286 (C. C. A. 2d, 1935). (See: App. Op. Br. pp. 23-24.)

B. The Rule Relative to Setting Aside Confirmed Sales and the Rule Relative to the Stability of Judicial Sales Have Full Application to the Instant Case.

Appellees make the contention in their brief that the above mentioned rules have "been repeatedly held not to have application to the approval or disapproval of a sale in bankruptcy until, following action by the referee, the District Court acts upon the matter." (Reply Br. p. 35.) However, the authorities hold that the foregoing rules are applicable at any time after actual confirmation of the sale. If the sale is actually confirmed, then the rules are applicable on a motion before the Referee to vacate the confirmation or on a Petition to Review before the District Court, and failure of the Referee or the District Court to follow such rules is reversible error.

In re Burr Mfg. & Supply Co., 217 Fed. 16 (C. C. A. 2d, 1914) (App. Op. Br. pp. 24-26);

Allen v. Union Transfer Co., 152 F. 2d 633 (C. C. A. 10th, 1945); cert. den. 327 U. S. 807 (1935) (App. Op. Br. pp. 26-27);

In re Hoffman, 16 F. 2d 939 (D. C. Pa., 1927) (App. Op. Br. pp. 33-34);

In re Pneumatic Tube Steam Splicer Co., 60 F. 2d 524 (D. C. Md., 1932) (App. Op. Br. pp. 34-35).

The principal decision relied on by appellees in support of their contention that the foregoing rules are not applicable to the instant case is *Reid v. King*, 157 F. 2d 868

(C. C. A. 4th, 1946). In this case, the Court directed the Trustee in Bankruptcy to sell certain assets of the Bankrupt estate, subject, however, to confirmation by the Court. The Trustee solicited sealed bids, and agreed to accept the highest bid made "subject to confirmation by the Court which might reject all offers." A person named Reid made the highest bid, but before the Trustee filed his report of the sale to the Referee, a person named King who had full knowledge of the previous sale but had not submitted a bid, made an offer to the Trustee totaling *35% more* than the bid made by Reid. At the hearing before the Referee for confirmation, the Referee asked for a bid higher than King's bid, and when no such bids were received, the Referee ordered King's bid accepted. This order was affirmed by the District Court. Reid appealed and the Court of Appeals affirmed. The Court held that since there had been no confirmation of Reid's bid, the Referee could confirm King's bid even though Reid's lower bid was not grossly inadequate. The Court makes a clear distinction between the rules applicable to the facts of that case where a sale has been made by the Trustee subject to confirmation by the Referee so that the Referee has before him the propriety of confirming the sale, and the rules applicable to setting aside a completed sale. If the Referee had already confirmed Reid's lower bid at the time King's higher bid was received, it is evident that the Court would have held in all probability that it was reversible error to vacate the confirmed sale to Reid. However, in the instant case there has never

been a firm bid in excess of appellant's offer, and thus the *Reid* case is not applicable in any event.

It is interesting to note that even before confirmation, this Circuit has held that a slightly higher bid made at the hearing on confirmation is not sufficient to require the Referee to refuse to confirm a private sale for a lesser amount theretofore made, even though the sale was subject to confirmation by the Referee. *Prentice v. Boteler*, 141 F. 2d 175 (C. C. A. 9, 1944) (App. Op. Br. pp. 35-36). It is also interesting to note that the Court of Appeals for the 4th Circuit has held that it is an abuse of discretion for the Bankruptcy Court to confirm a bid of about 10% more than the high bid received at a public auction, but not yet confirmed, in the absence of unfairness, fraud, mistake or gross inadequacy of price. *In re Stanley Engineering Corporation*, 164 F. 2d 316 (C. C. A. 3rd, 1947); cert. den. 68 Supreme Court 351 (1948) (App. Op. Br. pp. 36-38). However, it is not necessary in this case to consider whether *Reid v. King*, *supra*, is conflicting with the *Prentice* and *Stanley* cases, *supra*, inasmuch as all three of the cases recognize that *after confirmation*, the rule that a sale will not be vacated in the absence of fraud, accident, or mistake sufficient to avoid a sale between private parties, or such gross inadequacy of price as to raise a presumption of fraud, is fully applicable.

C. The District Court Had Discretion to Reverse the Order of the Referee Confirming the Sale Only on a Showing of Fraud, Accident or Mistake Sufficient to Avoid a Sale Between Private Parties, or Such Gross Inadequacy of Price as to Raise a Presumption of Fraud, and a Decision Not Based on Such a Showing Should Be Reversed on Appeal.

Appellees' brief does not contend that a showing within the above rule was made at the hearing before the District Court, and the transcript of the proceeding makes it evident that no such showing was made. (See: App. Op. Br. pp. 18-21.) Thus, since the rule above stated is applicable to the instant case, the ruling of the District Judge should be reversed and the Order of the Referee reinstated.

The only cases cited in Appellees' brief which are claimed to be in opposition to the above rule, in addition to the case of *Reid v. King, supra*, are the two cases analyzed hereinbelow.

In *Currin v. Nourse*, 66 F. 2d 137 (C. C. A. 8, 1933), the Trustee in Bankruptcy made a private sale of certain assets of a bankrupt estate pursuant to authority given by the Referee in Bankruptcy. The sale was confirmed by the Referee at a general creditors meeting, although the unsecured creditors did not have an opportunity to review the contract of sale and the Referee refused their motion for a continuance to give them an opportunity to review the contract. Thereafter, the unsecured creditors made a motion before the Referee to vacate the confirmation, but this motion was denied. A petition was filed by the unsecured creditors with the District Court

to review the decision of the Referee, but the District Court affirmed the Referee's order. The unsecured creditors appealed, and the Court of Appeals reversed, holding that the Referee should have granted the unsecured creditors an "opportunity to examine the contract of sale and have given them a reasonable time to be heard." The court held there was an abuse of discretion under these circumstances sufficient to justify remanding the case so that all parties were restored to the positions they occupied prior to the confirmation, and in addition, the Court directed the Referee to give a full and fair hearing to all parties.

It is evident that the foregoing decision (to be distinguished from a subsequent decision in the same matter cited in Appellant's opening brief, pages 31-33) is entirely proper on its facts, and that the decision does not in any respect support Appellees' contention that the rule hereinabove mentioned is inapplicable to the instant case. It is not even contended in the instant case that Appellees failed to get access to all pertinent documents and information, or that Appellees were deprived of their right to a full and fair hearing.

The other decision relied upon in Appellees' brief is *In re Wolke Lead Batteries Co.*, 294 Fed. 509 (C. C. A. 6th, 1923). In this decision the bankrupt estate owned real property appraised by the Court Appraiser at \$18,000. The property was offered for sale by the Trustee, and a person named Haag filed a sealed offer for \$2,000, but when the bids were opened, Haag raised his bid to \$12,000. The Trustee accepted this latter bid and reported it to the Referee for confirmation. Exceptions to the confirmation were filed and prior to the time Haag's bid

was confirmed, a person named Knight bid \$13,000 for the property. At the hearing on confirmation of Haag's offer, the Referee overruled the exceptions and confirmed the sale to Haag even though Knight had made a higher offer. On review before the District Court, the Referee's decision was reversed and the District Court ordered a resale of the property. At the resale, the Trustee accepted the high bid made by Knight for \$13,500, and Haag thereupon turned the property over to Knight and filed a petition asking for \$820.40 which he had expended in preserving and improving the property prior to the District Court's ruling. At the hearing before the Referee to confirm this sale to Knight, Haag's objections to the sale were overruled, the sale to Knight was confirmed, and Haag's claim for \$820.40 approved. This was affirmed by the District Court, and on appeal, the Court of Appeals also affirmed. The Court stated that the original confirmation of the sale to Haag by the Referee was subject to review by the District Court since Haag's bid was for less than 75% of the appraised value of the property, and that the District Court properly exercised its discretion in reviewing and reversing the Referee's Order under the circumstances. In addition, the Court held that Haag was in any event estopped from insisting on a reversal due to his petition to recover the \$820.40 expended by him in preserving and improving the property.

From the foregoing, it is clear that the *Wolke* case is to be distinguished from the instant case; first, because in the instant case there was an actual confirmation by the Referee of an offer in excess of 75% of the appraised value of the property which did not require and which

was not subject to review by the District Court (except on a Petition for Review putting the District Court in the position of an Appellate Court), whereas, in the *Wolke* case, the confirmation by the Referee was of necessity and pursuant to law subject to approval by the District Court; and secondly, the *Wolke* decision is to be distinguished from the instant case by the estoppel feature of the decision.

Conclusion.

For the reasons set out herein and in *Appellant's Opening Brief the Order Vacating and Setting Aside Referee's Order of December 19, 1947, Re Sale of Real Property to Procter & Gamble Manufacturing Company*, made by the District Court, should be reversed and the Referee's Order of December 19, 1947, confirming the sale of real property should be affirmed.

Respectfully submitted,

O'MELVENY & MYERS,

PIERCE WORKS,

RICHARD C. BERGEN,

HOWARD J. DEARDS,

By HOWARD J. DEARDS,

Attorneys for Appellant.

